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No. 86 - 1234

In The

Supreme Court of the United States

October Term, 1986

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO MILWAUKEE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Seventh Circuit erred in holding that the shareholders of the Milwaukee Road are precluded from seeking $210 million in the Claims Court for a taking of their property without just compensation when: (a) this Court expressly recognized in the *Regional Rail Reorganization Act Cases* that, under the Fifth Amendment, a Tucker Act remedy must be available to compensate an involuntary transfer of rail assets; (b) Congress explicitly guaranteed a Tucker Act remedy in the Milwaukee Railroad Restructuring Act; and (c) the Seventh Circuit had no authority to preempt relief under the Tucker Act.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to this case, Seventh Circuit No. 85-1683, were Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Debtor),* and its parent corporation, Chicago Milwaukee Corporation, as appellants, and the United States of America and the Interstate Commerce Commission, as appellees.

RULE 28.1 LISTING

The following are subsidiaries or affiliates of the Chicago Milwaukee Corporation:

CMC Real Estate Corporation
Hi-Way Paving, Inc.
CMC Investment Corporation
Vulcan-Hart Corporation
Hanson Porcelain Company, Inc.
Vulcan-Hart Canada, Inc.
Foster Refrigerator of Canada, Ltd.
Foster Refrigerator (U.K.) Limited
Southern Boiler & Tank Works, Inc.
Milwaukee Land Company
Des Moines Union Railway Company
Minnesota Transfer Railway Company

The Compagnie de Banque et d'Investissements of Switzerland holds 9.3% of the common stock of the Chicago Milwaukee Corporation.

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* The former Debtor has been renamed CMC Real Estate Corporation.

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In The

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO MILWAUKEE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road" or "Debtor") and its parent company, the Chicago Milwaukee Corporation ("CMC"), respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 799 F.2d 317 and appears at App. 1.[1] The order of the court of appeals denying the petition for rehearing with a suggestion for rehearing *in banc* is not reported and appears at App. 39. The decision and order of the district court is not reported and appears at App. 41.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1986. The petition for rehearing with suggestion for rehearing *in banc* was denied on October 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] "App." refers to the Appendix to this Petition, and "ICCR." refers to the record of the proceedings before the Interstate Commerce Commission.

The Staggers Rail Act of 1980, 45 U.S.C. § 1018(c), provides in relevant part:

> Nothing in . . . the Milwaukee Railroad Restructuring Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act.

The Tucker Act, 28 U.S.C. § 1491(a)(1), provides in relevant part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution. . . .

STATEMENT OF THE CASE

This case arises out of the Milwaukee Road reorganization proceedings and the court-ordered sale of the Milwaukee Road's core rail assets to the Soo Line Railroad Company ("the Soo") for $210 million less than the Chicago North Western Transportation Company ("the CNW") offered to pay for the same assets. (App. 2.) Although the ICC found that the bids for those assets by both the Soo and the CNW were consistent with the public interest, and therefore approved both bids, the ICC and the reorganization court each expressed a preference for the Soo bid on the ground that the public interest would be better served by a sale to the Soo. (App. 3-7.) The ICC and the reorganization court believed that the sale to the Soo would serve the ICC's administrative convenience, preserve more rail lines and jobs, and strengthen the national defense. (App. 3-7, 65-76.) Based on these public interest considerations, the reorganization court ordered that the rail assets be sold to the Soo, the lower bidder. (App. 42-44.)

The Milwaukee Railroad Restructuring Act ("MRRA"), 45 U.S.C. §§ 901-922, empowered the reorganization court to take the Debtor's property in the public interest. However, as this Court held in the *Regional Rail Reorganization Act Cases* ("*3R Act Cases*"), 419 U.S. 102 (1974), such a taking is constitutional only if a Tucker Act remedy is available to review the adequacy of the compensation paid.

The gravamen of this case is that the reorganization court did more than order a forced transfer of rail assets. Because the reorganization court also made a finding—neither contemplated nor authorized by the MRRA—that the Soo bid constituted just compensation, its decision purports to preclude the Milwaukee Road's shareholders from seeking Tucker Act relief in the Claims Court. The Seventh Circuit clearly recognized that the reorganization court's finding was erroneous, but refused to vacate it. (App. 13, 20.) Thus, contrary both to the plain language of the MRRA and to this Court's holding in the *3R Act Cases*, the Milwaukee Road's shareholders stand to suffer a $210 million taking of their property without any opportunity to seek just compensation.

Statutory Background

The United States District Court for the Northern District of Illinois, sitting as the reorganization court, exercised jurisdiction under both section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205, and the MRRA, 45 U.S.C. §§ 901-922.[2] Section 77 contains the statutory scheme which generally governs all aspects of railroad reorganization proceedings filed before October 1, 1979, including the sale of a debtor's rail assets. Significantly, under section 77, sales of rail assets must be in the best interests of an estate and at fair market value; and the debtor has the power to veto any forced sale. *See, e.g.*, Sections 77(b), (d), and (o) of the Bankruptcy Act, 11 U.S.C. §§ 205(b), (d), and (o); *St. Joe Paper Co. v. Atlantic Coast Line R.R. Co.*, 347 U.S. 298 (1954).

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[2] Because these reorganization proceedings were commenced in 1977, the proceedings continue to be governed by section 77 of the old Bankruptcy Act, former 11 U.S.C. § 205, and Article 8 of the old Bankruptcy Rules. *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 701 F.2d 604, 605 n.1 (7th Cir.), *cert. dismissed*, 463 U.S. 1233 (1983); Bankruptcy Reform Act of 1978, § 403(a), Pub. L. No. 95-598, 92 Stat. 2549, 2683.

The MRRA was enacted in 1979 as special emergency legislation to preserve rail service and jobs in the Midwest. (*See* 45 U.S.C. § 901; H.R. REP. NO. 583, 96th Cong., 1st Sess. 15, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1747, 1747-49.) Among other things, the MRRA provides a streamlined procedure to permit the expedited transfer of the Milwaukee Road's rail lines to serve public interest goals. 45 U.S.C. § 904(b). Unlike section 77, the MRRA does not require that sales be in the best interests of an estate or at fair market value. Moreover, the MRRA does not provide for the debtor's veto of forced sales. (App. 54-55.)

In place of the safeguards available under section 77, or in any ordinary bankruptcy, the Staggers Rail Act of 1980 amended the MRRA to make clear that nothing contained in the MRRA "shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act." 45 U.S.C. § 1018(c). The Tucker Act provides that claims against the United States based upon the Constitution, including claims for the taking of property without just compensation, may be brought in the Claims Court. 28 U.S.C. § 1491(a)(1).

The Staggers Rail Act amendment was enacted to make explicit that the MRRA conformed to the constitutional principle articulated in the *3R Act Cases*. (*See* H.R. REP.

No. 1430, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4169.) There, this Court held that a similar statute, the Regional Rail Reorganization Act ("3R Act"), 45 U.S.C. §§ 701 *et seq.*, passed constitutional muster only because an implied Tucker Act remedy was available for any taking claim. *3R Act Cases,* 419 U.S. at 125-36, 148-56.

Proceedings in the Reorganization Court

On December 19, 1977, following years of enormous losses, the Milwaukee Road filed a petition for reorganization under section 77. Despite repeated efforts to reorganize the Debtor as an operating railroad, which caused an additional erosion of the shareholders' equity in an amount the trustee estimated to exceed $220 million, the trustee eventually concluded that the Debtor's rail assets should be sold. (ICCR. 416, Verified Statement of Richard B. Ogilvie, filed with Comments of Trustee, April 13, 1984, at 9-10.)

There were three bidders for the Milwaukee Road's rail assets: the Grand Trunk Corporation ("GTC"), the Soo, and the CNW. (App. 3.) The CNW's bid was $210 million higher than the next highest bid, which was made by the Soo. (App. 2.) Pursuant to section 5(b) of the MRRA, 45 U.S.C. § 904(b), the reorganization court submitted all three bids to the ICC for its review and approval. (App. 3.) In addition, the reorganization court asked the ICC to express its preference among these bids—although this procedure is not authorized by the MRRA. (App. 4-5.)

The ICC declined to approve GTC's bid, but it approved both the Soo and the CNW bids, finding both to be consistent with the public interest as required by the Interstate Commerce Act, 49 U.S.C. § 11344(b). (App. 3-5.) By a 4 to 3 vote, the ICC expressed its preference for the Soo proposal on public interest grounds. (App. 5.)

On February 19, 1985, relying upon the record before the ICC, and over the strenuous objections of the Trustee, Debtor, creditors, and shareholders, the reorganization court ordered that the Milwaukee Road's rail assets be sold to the Soo. (App. 42-44.) Although the reorganization court based its decision solely on the public interest considerations set forth above, it made a gratuitous finding that the Soo bid was "just compensation," and it characterized the significantly higher CNW bid as a "windfall." (App. 3-7, 56, 65-76.) Late that evening, the sale closed and the assets were conveyed to the Soo. (App. 8.)

The Decision of the Court of Appeals

Under the statutory scheme established by Congress in the MRRA, the Debtor and CMC were to obtain just compensation for the rail lines sold in the public interest by filing a Tucker Act suit in the Claims Court.[3] To avoid any argument of waiver, collateral estoppel, or res judicata which might be based upon the reorganization court's unauthorized finding as to just compensation, the Debtor and CMC appealed to the Seventh Circuit and asked it to vacate that finding. (App. 2.)

The Seventh Circuit assumed that the reorganization court's finding of just compensation was erroneous because the fair market value of the railroad's property was established by the CNW's $210 million higher bid. (App. 13.) Moreover, the Seventh Circuit found it "unsettling to contemplate the prospect of $210 million gone without redress—without even full appellate review of the decision to sell to the Soo." (App. 20.) Nonetheless, the Seventh Circuit not only refused to vacate the finding of just compensation, but it added its own gratuitous gloss. It held that no Tucker Act remedy was available, speculating that any contrary result would require the United States Treasury to guarantee the accuracy of all judicial decisions. (App. 19-20.)

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[3] Bankruptcy Rule 8-703(a)(6) provides that a sale to a good faith purchaser may not be overturned on appeal. The Debtor and CMC have never questioned the Soo's status as a good faith purchaser.

REASONS FOR GRANTING THE WRIT

By reading the Tucker Act remedy out of the MRRA, the Seventh Circuit has attempted to foreclose relief for a taking of historic proportions. The Constitution requires that the Debtor and CMC be permitted to seek Tucker Act relief in the Claims Court to review the adequacy of the compensation paid for the taking. In the *3R Act Cases*, this Court held that the 3R Act would be unconstitutional if no Tucker Act relief were available. In the Staggers Rail Act, Congress affirmatively provided a Tucker Act remedy under the MRRA to make that guarantee explicit. Yet the Seventh Circuit has held that no Tucker Act remedy is available.

The Seventh Circuit decision so far departs from the normal course of judicial proceedings that review by this Court is warranted. The decision below directly conflicts with a recent decision of this Court, a statute enacted by Congress, and a decision of the Third Circuit Court of Appeals. Its effect is to work a $210 million injustice upon the shareholders of the Milwaukee Road. This Court should grant certiorari and set down this case for plenary consideration or, in the alternative, summarily reverse with instructions that the just compensation finding be vacated.

THE DEBTOR AND CMC ARE ENTITLED TO SEEK JUST COMPENSATION IN THE CLAIMS COURT FOR THE TAKING OF THEIR PROPERTY.

A. Both The Fifth Amendment And The *3R Act Cases* Require That There Be Tucker Act Relief.

The Seventh Circuit's attempt to preclude a Tucker Act remedy squarely conflicts with the Fifth Amendment and with this Court's ruling in the *3R Act Cases*, that a taking is permissible only if the adequacy of the compensation paid can be tested in a Claims Court suit. Here, the reorganization court ordered an involuntary sale to the lower bidder. This caused a $210 million taking because private parties, the Milwaukee Road shareholders, were required "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[4]

As the Seventh Circuit's opinion recognized, the Milwaukee Road's shareholders did not receive just compensation for their property. (App. 13.) The court stated that the $210 million higher CNW bid constituted the fair market value of the rail assets and, therefore, their constitutional minimum value. (App. 13.)[5] However, instead of requiring a sale for no less than the constitutional minimum, the MRRA authorized the reorganization court to disregard the best interests of the estate and to subordinate its interests to the public interest.

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[4] *See also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

[5] *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). As the Seventh Circuit found, the heavily regulated nature of the railroad industry cannot justify the $210 million diminution in value of the Milwaukee Road's assets, because the bids presented to the reorganization court already reflected the cost of regulation. (App. 15-16.)

The Seventh Circuit's decision squarely conflicts with this Court's decision in the *3R Act Cases*, 419 U.S. 102 (1974), in which this Court specifically addressed the constitutionality of a court-ordered taking of rail assets under the 3R Act. The 3R Act authorized the expedited transfer of rail lines to Conrail and was silent as to whether a Tucker Act remedy existed to review the adequacy of the compensation to be paid pursuant to the statute. 45 U.S.C. §§ 701 *et seq.* This Court ruled that the 3R Act survived constitutional scrutiny only because Congress had not precluded an injured party from bringing a Tucker Act suit against the United States for civil money damages. 419 U.S. at 125-36, 148-56. Thus, the Seventh Circuit's purported foreclosure of Tucker Act relief renders the MRRA as applied unconstitutional under the Fifth Amendment.

The Seventh Circuit justified its decision by expressing a fear that if relief for a taking were available in this case, the floodgates would be opened to suits against the United States whenever judges err. (App. 19.) This fear is unfounded. The Seventh Circuit erroneously focused on the reorganization court's mistaken finding that the Soo bid constituted just compensation. However, the reorganization court's critical error was to address the issue of just compensation when it had no authority to do so. Like the 3R Act, the MRRA contemplates a two-pronged procedure whereby the reorganization court may order the expeditious sale of rail assets, while any claim for just compensation must be pursued in a subsequent Claims Court suit. Thus, any principle granting redress here would apply only to claims arising under legislation having these specific features, and only Congress could increase the number of Tucker Act claims by enacting comparable legislation.

Moreover, under the Seventh Circuit's analysis, acts which would constitute a taking if committed by any agency are not a taking if committed by a judge. This distinction has no foundation in any principled interpretation of the Fifth Amendment and will eviscerate the constitutional protection afforded private property. Congress should not be able to avoid paying just compensation by the simple expedient of delegating quick-take authority to a federal district judge rather than to an administrative agency or executive officer. In light of the direct conflict with this Court's decision in the *3R Act Cases*, this Court should grant certiorari and reverse the decision of the Seventh Circuit.

B. Congress Intended That The Milwaukee Road's Shareholders Have A Tucker Act Remedy.

The Seventh Circuit ignored the Congressional guarantee of a Tucker Act remedy under the MRRA. 45 U.S.C. § 1018(c). Instead, the Seventh Circuit made two erroneous rulings: (1) that the MRRA required the reorganization court to find that compensation was just before it could order a sale of rail assets; and (2) that Tucker Act relief was unavailable. (App. 20.)

Congress specifically recognized that the urgent public need to preserve the Milwaukee Road's rail lines required a quick transfer without just compensation. (*See* 45 U.S.C. § 901; H.R. REP. NO. 1430, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4110, 4169; H.R. REP. NO. 583, 96th Cong., 1st Sess. 15, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1747, 1748.) Indeed, that recognition lay at the very heart of the MRRA. For that reason, and because of the constitutional rule articulated by this Court in the *3R Act Cases*, Congress enacted the Staggers Act amendment, which expressly guarantees Tucker Act relief:

> Nothing . . . in the Milwaukee Railroad Restructuring Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act.

45 U.S.C. § 1018(c).

The Seventh's Circuit's holding—that a finding of just compensation is a prerequisite for a court-ordered sale of the Milwaukee Road's rail assets—reads the Staggers Act amendment out of the MRRA. By definition, if a reorganization court has to find just compensation before ordering a rail transfer, there can never be a taking requiring Tucker Act relief. Thus, this Court should grant certiorari because the decision below squarely conflicts with the Congressional directive contained in the very statute that authorized this taking.

C. The Seventh Circuit Lacked Jurisdiction To Preempt Claims Court Relief.

The Seventh Circuit lacked jurisdiction to usurp the subject matter jurisdiction of the Claims Court. The Claims Court has exclusive jurisdiction over all claims against the United States in excess of $10,000, and also has exclusive jurisdiction to determine whether there has been a taking without just compensation. 28 U.S.C. §§ 1491, 1346(a)(2).[6] The MRRA authorizes the reorganization court

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[6] The courts of appeals are in agreement on this issue. *See, e.g.*, *Chas T. Main Int'l, Inc. v. Khuzestan Water & Power Authority*, 651 F.2d 800, 815 (1st Cir. 1981); *Estate of Watson v. Blumenthal*, 586 F.2d 925, 929 (2d Cir. 1978); *Hahn v. United States*, 757 F.2d 581, 585-86 (3d Cir. 1985); *Portsmouth Redevelopment &*

(Footnote continued on following page)

to order a sale of rail assets in an expedited manner if the public interest so requires, but does not authorize any inquiry into the constitutional adequacy of the compensation. 45 U.S.C. §§ 901, 904(b). The statute leaves the issue of compensation to the Tucker Act and the Claims Court. (App. 56.)

In *In re Penn Central Transportation Co.*, 520 F.2d 1388 (3d Cir. 1975), also a rail reorganization case, the Third Circuit held that the Penn Central reorganization court lacked authority to enjoin the Penn Central Company from proceeding with a taking claim in the Claims Court. In a ruling directly contrary to that of the Seventh Circuit here, the Third Circuit held that the taking issue was exclusively for the Claims Court:

> There is . . . no jurisdiction in the reorganization court to adjudicate the Tucker Act claim which Penn Central Company asserts, since jurisdiction over that claim rests exclusively in the Court of Claims.

In re Penn Central Transportation Co., 520 F.2d at 1392.

The government has contended that the reorganization court's finding will preclude the Debtor and CMC from seeking a Tucker Act remedy in the Claims Court. (App.

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[6] *continued*

Housing Authority v. Pierce, 706 F.2d 471, 473 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 974 (5th Cir. 1981); *Chelsea Community Hospital v. Michigan Blue Cross Ass'n*, 630 F.2d 1131, 1136 (6th Cir. 1980); *Clark v. United States*, 596 F.2d 252, 253 (7th Cir. 1979); *Polos v. United States*, 556 F.2d 903, 905 (8th Cir. 1977); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984); *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 823 (10th Cir. 1981); *Keller v. Merit Systems Protection Board*, 679 F.2d 220, 222 (11th Cir. 1982); *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1101 (D.C. Cir. 1985). *See also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978).

8.) The Seventh Circuit agreed that its compensation ruling "will conclude the outcome of the Tucker Act litigation." (App. 13.) This Court should grant certiorari to correct the unauthorized action of the Seventh Circuit and to resolve the direct conflict with the Third Circuit's decision in *Penn Central.*

CONCLUSION

The Seventh Circuit decision conflicts with the Constitution, this Court's decision in the *3R Act Cases*, the MRRA, and the Third Circuit's decision in *Penn Central*. Accordingly, the petition for a writ of certiorari should be granted and the case set down for plenary consideration. In the alternative, because the decision below squarely conflicts with this Court's decision in the *3R Act Cases*, the Court may wish to consider summary reversal and remand with instructions to vacate the finding on just compensation.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 85-1554, 85-1683, 85-2121,
85-2122, and 85-2123

In the Matter of:

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,

Debtor,

Appeals of:

RAILWAY LABOR EXECUTIVES' ASSOCIATION
CMC REAL ESTATE CORPORATION
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY
SEABOARD SYSTEM RAILROAD, INC.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 77 B 8999—**Thomas R. McMillen**, *Judge.*

Nos. 85-1573 and 85-1953

SEABOARD SYSTEM RAILROAD, INC., and
RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

Petitions for Review of Decisions of the
Interstate Commerce Commission

ARGUED FEBRUARY 28, 1986—DECIDED AUGUST 20, 1986

Before WOOD, JR., and EASTERBROOK, *Circuit Judges*, and BARKER, *District Judge.**

EASTERBROOK, *Circuit Judge.* The Soo Line R.R. bought the railroad operations of the bankrupt Chicago, Milwaukee, St. Paul & Pacific R.R. in February 1985 for $150 million plus the assumption of liabilities estimated at $420 million. The district court approved the Soo's bid even though the Chicago & North Western Transportation Co. (CNW) bid $360 million plus assumption of essentially the same liabilities, and even though the Interstate Commerce Commission had found both proposed acquisitions to be consistent with the public interest. The district court thought the Soo's bid preferable because the Soo planned to abandon less of the Milwaukee's track—abandonments that the district court thought might impair the country's military security.

The investors in the Milwaukee, not understanding why they should be required to contribute $210 million to the national defense, contend that the district court's approval of the sale "took" their property. They have asked the Claims Court, which under 28 U.S.C. §1491 has exclusive jurisdiction of money claims against the United States arising out of takings, for relief. They ask us to set aside a paragraph in the district court's order that approved a finding of the ICC that the Soo's bid was constitutionally adequate, a paragraph that will impair if not preclude their suit in the Claims Court.

The Railway Labor Executives' Association (RLEA) challenges the sale, too, but on different grounds: it says that the district court did not impose sufficient conditions for the preservation of employment of the Milwaukee's employees. The RLEA also asks us to set aside an order of the ICC declining to review the Milwaukee's final plan of reorganization. Finally, the Seaboard Line wants us to set aside the district court's decision (and an order of the ICC) to the extent they allow the Soo to operate trains over the Seaboard's line between Bedford and New Albany, Indiana. These trackage rights enable the Soo to haul traffic from Chicago to Louisville, traffic the Seaboard otherwise might move.

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* The Honorable Sarah Evans Barker, of the United States District Court for the Southern District of Indiana, is sitting by designation.

Because the challenges to the sale are so disparate, we treat the facts pertinent to each challenge separately. Part I addresses the investors' constitutional argument, Part II the RLEA's arguments about protective conditions, and Part III the Seaboard's request to reclaim control of its track.

I

A

The Trustee of the Milwaukee managed its business for several years, paring unprofitable operations and refurbishing deteriorating track. The ICC and the reorganization court decided that the Milwaukee would not be a successful line if operated alone, so the Trustee put its railroad lines and related rail assets up for bids. Three bidders remained at the end: the Soo Line, the Grand Trunk, and the CNW. The ICC, whose approval was required under §5(b) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §904(b), and the Interstate Commerce Act, 49 U.S.C. §11344, rejected the Grand Trunk's proposal. *Chicago, Milwaukee, St. Paul & Pacific R.R.—Reorganization*, Fin. Dkt. No. 28640, ____ I.C.C.2d ____ (Sept. 26, 1984). In the same decision the ICC expressed concern that the CNW's proposal would eliminate some competition (the Milwaukee competed with the CNW in many markets), while acquisition by the Soo would have a smaller competitive effect. It therefore proposed conditions that would have required the CNW to grant trackage rights, allowing other railroads to operate over its lines to furnish competing service. Chairman Taylor and Vice Chairman Andre approved the Soo's proposal but did not state their reasons (except to the extent they may be inferred from the ICC's exceedingly lengthy analysis of all the proposals). Commissioner Gradison favored the Soo's proposal only because it required fewer conditions; she thought the public benefits of the two proposals were otherwise equal. Commissioner Sterrett favored the CNW's proposal. The ICC "approved" only the Soo's proposal but noted that its failure to disapprove the CNW's left the reorganization court with the discretion to choose either.

One of the issues before the ICC was the adequacy of the consideration offered by the bidders. Both Soo and CNW offered some $150 million in addition to the assumption of debts. Chicago Milwaukee Corporation (since renamed CMC Real Estate Corp.), the entity that was to emerge with the Milwaukee's non-rail assets and the net payment from the winning bidder (and thus the representative of the Milwaukee's equity investors), objected that $150 million was too little. The net value of the railroad assets was at least $360 million, according to CMC. The ICC rejected the CMC's position for two reasons: first, the $360 million valuation was the result of discounting to present value an assumed flow of future earnings, a methodology the Commission thought unreliable; second, the value did not represent any actual bid that CMC was willing to accept. The ICC instead decided to value the Milwaukee's rail assets by looking for a multiple of current earnings. A bid of $150 million represented a multiple of 16.9 times the Milwaukee's current earnings and eight times its projected earnings for 1984. The multiple of 16.9 was almost twice the average of five large carriers reflected in stock market valuations in 1983. CMC's asking price of $360 million, more than 40 times current earnings, struck the ICC as unrealistic.

CNW then met CMC's "unrealistic" demand, offering $360 million (in addition to the assumption of more than $420 million in liabilities) for the Milwaukee's rail operations. CMC and the Trustee declared they were satisfied. The ICC considered this revised bid, reopened the former decision (which had suspended judgment on the CNW's proposal) and formally approved CNW's bid. ____ I.C.C.2d

____ (Jan. 8, 1985). It concluded that CNW could realize operational savings of $123 million without abandoning any lines. But by a vote of 4-3 the ICC again favored the acquisition by the Soo. The majority (Chairman Taylor and Commissioners Simmons, Lamboley, and Strenio) concluded that the Soo's bid, though $210 million less than the CNW's, remained fair and constitutionally adequate because it exceeded the net liquidation value of the Milwaukee's rail properties and the average price-earnings multiple of other railroads. The majority was divided, with Chairman Taylor and Commissioner Simmons voting to disapprove the CNW's bid, largely on the ground that acquisition by the Soo would create new competition while acquisition by CNW would not and, without the use of conditions and trackage rights, would reduce competition. Commissioner Strenio, on the other hand, thought the matter "extremely close" and explained that he favored the acquisition by Soo because it "calls for more head-to-head competition between rail carriers". Commissioner Gradison favored the CNW's proposal because of its higher price, raising doubts that the Soo's could be called "fair" to CMC. Vice Chairman Andre and Commissioner Sterrett, although favoring CNW's bid, did not explain their positions.

The reorganization court spoke next, approving the Soo's bid despite the request by the Trustee and CMC that it sell to the CNW. The judge did not write an opinion explaining why. His oral remarks state that he was concerned that CNW planned to file with the ICC an application to abandon as much as 1,100 miles of track if they should prove unprofitable. (CNW had not asked for permission to abandon any particular track, and any concrete proposals would have triggered their own proceedings.) The district court objected to the potential abandonment on several grounds.

> Now, what is the matter with abandonment? Well, for one thing it costs jobs. People are going to be out of work that were working on the abandoned transportation system or routes. Another considera-

> tion that hasn't been, really, considered very much but was mentioned by one of the Commissioners . . . is the matter of national security.
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> . . . .
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> . . . I would say once a railroad is abandoned once a piece of trackage is pulled up and the land sold it isn't going to be replaced. It is almost irresponsible under the international situation that we are faced with today to tear up pieces of a railroad system, which is probably the best in the world, for no better reason than a few million dollars in the bidding price.
>
> I must say that I think that national security is a very important consideration for keeping an extensive and more viable system of transportation . . . .

A few hundred million here and a few hundred million there, and we may be talking real money. (Apologies to Everett Dirksen.) But the Department of Defense had not expressed the view that abandonment of track is contrary to interests of national security, and Congress recently made it easier to abandon unprofitable track. See *Hayfield Northern R.R. v. Chicago & North Western Transportation* Co., 467 U.S. 622, 628-31 (1984) (describing the evolution of statutes concerning abandonment); cf. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 319-23 (1981).

The court gave two other reasons for preferring Soo's bid. One is that the trackage rights that the ICC had recommended to counteract competitive problems in acquisition by the CNW would require administrative and judicial supervision; the court thought that the less supervision the better. The other is that the Soo's parent corporation is the Canadian Pacific Railway. The court stated:

> Let's face it. The United States needs foreign trade and needs friends. We are no longer an unsinkable battleship, as they called the British Isles in World War II. If there is going to be another World War, the United States and our transportation system and our cities are going to be targets for the enemy to

> hit. If we have friends in Canada, we have access to Canada, we have one more way of defending ourselves. But aside from that because I'm not an alarmist about international affairs, it certainly does promote international trade and we certainly are in need of that.

Having established its foreign policy, the court considered whether the Soo's bid was constitutionally adequate. The court relied on what it characterized as the ICC's finding that each bid was "well above the fair market value" of the railroad properties of the Milwaukee. This created a problem, because the CNW had made the higher bid, and actual bids usually *establish* the "fair market value" of the property; the ICC's initial decision had relied on the absence of a bid higher than the Soo's to show that CMC's valuation was unrealistic. The district judge dismissed the extra $210 million as a "windfall" that was "not the property of the CMC" and "not by any means a controlling factor in which railroads should prevail in this particular contest." Although the ICC had held that an acquisition by the CNW would not violate the antitrust laws, a position that the Antitrust Division, representing the United States in this litigation, does not contest, a position the district court apparently accepted, the judge also offered the view that the $210 million difference reflected only the price at which the CNW could "buy out some of its competition".

The court then entered an order directing that the Milwaukee's rail assets be sold to the Soo. Paragraph 4 of this order states that the court has considered all of the objections to the ICC's findings and recommendations and that:

> the Commission's findings and decisions should be and are approved by this Court, since the findings and decisions were in accordance with law and were not arbitrary, capricious, an abuse of discretion, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority

> or limitations, short of statutory right, or without observance of procedure required by law.

The court apparently meant this paragraph to adopt the ICC's conclusion that the Soo's price was constitutionally sufficient and thus dispose of CMC's argument about the inadequacy of the price, because no other part of the order approving the sale deals with the subject of price.

B

After several parties asked for (and did not get) a stay from this court, Milwaukee and the Soo closed the sale on February 20, 1985. CNW has withdrawn its bid, and CMC does not want to upset the sale to the Soo. The United States and the ICC say that this makes the case moot. Paragraph 4 of the court's order does not affect anything any more, and a court ought not to offer advisory opinions on what would have been. Paragraph 4 is not without moment, however. CMC believes that this paragraph, the equivalent of a declaratory judgment that the Soo's bid satisfied all constitutional requirements, would block its effort to collect under the Tucker Act in the Claims Court. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 37-38 (1950) (preclusion applies even if review of the earlier judgment was prevented by mootness). CMC wants an obstacle out of the way.

Because the government took the view that paragraph 4 is meaningless, we asked at oral argument whether it would accept an order under *Munsingwear*, 340 U.S. at 39-41, vacating paragraph 4 as moot. See also *Department of the Treasury v. Galioto*, 106 S. Ct. 2683 (1986). The United States objected, for it apparently wants to use paragraph 4 to obtain issue preclusion (collateral estoppel) in the Tucker Act litigation. The continuing dispute means, however, that the case is not moot. The parties are embroiled in controversy about whether the Soo's price was adequate. If they put the question before the Claims Court, that court would not find the matter moot. Because the underlying dispute, the "case or controversy," determines whether a case is moot, this case is not. Suppose Congress had authorized CMC to proceed in two stages: first, to obtain a declaratory judgment in Illinois that the price was inadequate; second, to ask the Claims Court to order the payment of money if the inadequacy is a "taking". No one would say that an appeal from the judgment that the price is adequate is "moot" because the court in Illinois could not order any additional relief. We have that case. More than $210 million hangs in the balance. The accident that divides the issues in the Tucker Act litigation between the Northern District of Illinois and the Claims Court does not make this issue moot. Paragraph 4 resolved a point of contention in an ongoing dispute. It is no different from a declaratory judgment entered by the district court.

Nonetheless there is a substantial question whether we should review paragraph 4. It is one of comity between courts. The Claims Court has exclusive jurisdiction over Tucker Act cases, as the Northern District of Illinois has exclusive jurisdiction over this, the only case under the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§901-22. One issue, whether the Soo's price was adequate, is common to both cases. The district court had to address the question to decide who got the Milwaukee's rail properties and at what price; the Claims Court may need to resolve it (if principles of preclusion do not bar the way) to decide whether to order the United States to compensate CMC for the difference between the Soo's bid and the CNW's. Each court is authorized to decide. But the *reason* the district court was authorized to do so has disappeared. The sale to the Soo may not be undone. Its price is fixed. The question of comity is whether, now that the district court's objective in answering the question has been realized, further litigation that would affect the takings claim should be in the Claims Court and the Federal Circuit.

It is not clear, however, how we might bring that about. The statute authorizing transfers of appeals, 28 U.S.C. §1631, is limited to appeals that do not invoke the jurisdiction of the court in which they were filed. An appeal from paragraph 4 is within our jurisdiction and may not be transferred to the Federal Circuit. We have explained why it is inappropriate to vacate paragraph 4 as moot. Still a third possibility is to dismiss CMC's appeal because paragraph 4 is no longer relevant to the disposition of any issue concerning Soo's right to own and operate the rail properties. But under *Munsingwear* an order that left paragraph 4 standing would preclude any collateral challenge in the Claims Court. See 340 U.S. at 37-38; see also *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388, 391 (1929) (a decision by a state court precludes relitigation of issues that affect a federal case even though the federal court has exclusive jurisdiction of patent issues); *Murphy v. Gallagher*, 761 F.2d 878, 885-86 (2d Cir. 1985) (same in securities law); *Restatement (Second) of Judgments* §28(3), comment d at 279, and reporter's note at 287-88 (when the first court has afforded a full litigation of an issue, and the parties had the incentive to present their claims fully, the decision binds in litigation before a specialized court of exclusive jurisdiction). Cf. *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1152-54 (7th Cir. 1984) (en banc) (as a matter of federal law of claim preclusion, a court of exclusive jurisdiction is bound by an earlier judgment of another court on the same claim for relief), *reversed*, 105 S. Ct. 1327 (1985) (holding that state law of preclusion applies when the first judgment is rendered by a state court). The Federal Circuit, as successor to the Court of Claims, takes this view of preclusion. E.g., *General Dynamics Corp. v. United States*, 558 F.2d 985, 993-94 (Ct. Cl. 1977); *Gary Aircraft Corp.*, 226 Ct. Cl. 568, 573 (1981) (dictum); cf. *McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985).

Still another possibility is to vacate paragraph 4 as a matter of comity between courts, leaving all issues to the Claims Court. There is some support for this approach in cases involving state-federal relations. E.g., *Colorado River Water Conservation District v. United States*, 424

U.S. 800 (1976) (federal court should abstain when a state court has broad jurisdiction over water rights issues and should consider all claims to water in a single case); *Samuels v. Mackell,* 401 U.S. 66 (1971) (federal court should not issue a declaratory judgment that will conclude central issues in ongoing state criminal prosecution). See also David L. Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. Rev. 543 (1985) (discussing the extent to which courts have discretion not to resolve cases within their jurisdiction). But these abstention cases all involved federal litigation that would interfere with ongoing state litigation; the Supreme Court has never suggested that a federal court ought to vacate an *existing* judgment in order to permit relitigation of a settled claim elsewhere. It has held, instead, that a federal court may issue a declaratory judgment whose principal if not sole purpose is to preclude later state litigation. See *Steffel v. Thompson,* 415 U.S. 452 (1974). (The case did not decide, however, whether state courts were bound to respect the federal judgment, and the Justices took divergent views in separate opinions.) More recently the Court held it appropriate to issue a declaratory judgment designed to preempt issues of law that will come before what would otherwise be a tribunal of exclusive jurisdiction. See *United Auto Workers v. Brock,* 106 S. Ct. 2523, 2529-31 (1986). Unless the second tribunal has immunity from such interference, as in *Green v. Mansour,* 106 S. Ct. 423 (1986), it is appropriate for the first court properly seized of jurisdiction to decide the complete question.

Although *Steffel* and *UAW v. Brock* show that one court may issue declaratory relief that binds a second tribunal of exclusive jurisdiction, they do not hold that it *must.* Each court must decide whether the potential interference with the business of another is prudent. *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952); *Brillhart v. Excess Insurance Co.,* 316 U.S. 491 (1942). It is prudent here. The Claims Court does not possess unique expertise in valuing property or resolving takings claims. The ICC also values railroads (as it did here), and district courts regularly value property for takings purposes in condemnation suits by the government under 28 U.S.C. §1358 and 40 U.S.C. §§257-258f. The exclusivity of the Claims Court is designed to put in one forum all suits seeking money when the United States maintains that it owes nothing; the purposes of that exclusivity would not be undercut by a decision that paragraph 4 of the district court's judgment prevents recovery against the United States.

Several things counsel immediate resolution of the dispute. One is that the valuation was fully litigated before the ICC, which issued mountainous valuation studies and two full opinions, and the district court. The parties invested their all; with $210 million on the table, no one held back. The parties are entitled to the benefit of the judgment for which they fought, not least because the transaction would not have occurred if the district court had found the Soo's bid insufficient. The disputed finding was an essential ingredient of the transaction; had the district court made a different finding, the CNW would own the rail assets and there would be no claim of taking. The reliance interests of the parties—including the United States, which through the ICC could have blocked this deal if it thought the decision exposed the Treasury to a $210 million award—are substantial. Only the gravest reasons would lead us to vacate the district court's judgment and send the parties onward to a fresh litigation. There may be reasons on the merits why the judgment must be vacated (though we hold otherwise below), but it is on the merits that the judgment should stand or fall.

The parties have briefed two issues: whether the district judge was right in declaring the Soo's bid sufficient, and whether the accuracy of the decision matters. Either ground supplies a sufficient reason to leave paragraph 4 undisturbed. It is tempting to address the merits and leave the rest to the Claims Court. If the Soo's bid is adequate, the case is over; if not, the Claims Court may decide whether compensation is due. Yet a resolution of this issue would prove to be advisory if the accuracy of the district court's decision does not matter. Courts should address issues in a sequence that avoids the resolution of surplus issues. Cf. *Adams v. Indiana*, No. 85-3212 (7th Cir. July 3, 1986), slip op. 5. The first issue as a logical matter is whether an error in paragraph 4 could be a taking. The parties have briefed this issue fully. We recognize that consideration of this issue may seem to trench even more directly on the Claims Court's jurisdiction than would consideration of the accuracy of the district court's decision. But the Claims Court has exclusive jurisdiction of *cases*, not of issues (as the district court's jurisdiction of condemnation cases shows), and under the rationale of *Steffel* and *UAW v. Brock* we are free to dispose of this issue even though it will conclude the outcome of the Tucker Act litigation. It is best to bring this controversy to a conclusion, if that is within our power. It is.

C

We shall assume that the district judge erred in believing that $570 million would have been "just compensation", had the United States condemned the Milwaukee's rail properties. See *United States v. 50 Acres of Land*, 105 S. Ct. 451 (1984) (the price that a willing buyer would pay a willing seller is the constitutional measure of just compensation); *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982) (the fair market value of a line of railroad is the line's scrap value when there is no higher bid); *In re Valuation Proceeding*, 445 F. Supp. 994, 1008-29 (Spec. Rail Ct. 1977) (Friendly, J.) (rejecting the argument that valuation should be at scrap value when a sale at a higher price for a rail use is possible); cf. *In re Chicago, Rock Island & Pacific R.R.*, No. 85-2505 (7th Cir. June 24, 1986), slip op. 5 (actual bids, not hypothetical calculations, are the best indicia of value). CMC thinks that error is the same as a taking.

There are two preliminary obstacles. The government contends that judges do not "take" property; a "taking" is a deliberate act by the political branches, and judges have no authority to act for the political branches. The government also insists that owners of railroads accept the risk that the value of their property will be reduced by regulation, which is all that happened here. Neither of these arguments is complete.

It is a matter of indifference to CMC whether a judge or the ICC determines that the Soo rather than the CNW prevails. The Takings Clause of the fifth amendment, which states "nor shall private property be taken for public use, without just compensation", addresses the United States as an entity. If the United States adopts a policy that takes property, it should not matter that a judge is the instrument of the policy. The ICC in the first instance found $570 million sufficient, and had the ICC been authorized to sell the line this would have exposed the United States to a claim; the court's approval of the ICC's decision did not make the sale any the less a transfer at the behest of the United States at a price it found sufficient. The role of the agency is not indispensable, either. Suppose the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-22, under which the court acted, had authorized the judge to donate the property of the Milwaukee to a charity of his choice. The United States could not use the judge's role to escape paying compensation. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-25, 137-39, 154-56 (1974) (diminution of value of a railroad while a court reorganizes and values it could be a taking).

The Restructuring Act does not authorize a judge to give the railroad away, but it does grant the judge control over sales of the Milwaukee's lines, 45 U.S.C. §904; instead of holding an auction, as in an ordinary bankruptcy case, the judge may choose the buyer. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 756 F.2d 508 (7th Cir. 1985). There is no big difference between giving away half of the Milwaukee's property for nothing and selling all of it for half of its value. More, former Bankruptcy Rule 8-703(a)(6), which applies to this reorganization, provides that once a sale to a good faith purchaser has taken place it may not be undone on appeal. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 641 F.2d 482, 484-86 (7th Cir. 1981). See also 11 U.S.C. §363(m). This rule increases the chance of error in the process as a whole by making it harder for an appellate court to review the district court's decisions; sometimes the appellate court will act quickly (without adequate information and contemplation), and sometimes, as here, it will not act at all. The political branches therefore share with the judicial branch responsibility for what may have been a mistake that diminished the value of the Milwaukee's estate. If an incorrect valuation and final approval by the ICC would be a taking by the United States, the same mistake by a court exercising administrative powers is no less a taking.

The argument that because railroads are heavily regulated their owners must put up with diminutions in value fares no better. Regulation may diminish the value of property without "taking" it. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); cf. *McDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566-67 (1986). Railroads have long been subject to regulation that diminishes their profitability. But it does not follow that diminution by all means is permitted. If Congress condemned a railroad station to serve as a post office, this would be a taking notwithstanding the web of regulation surrounding the railroad, notwithstanding that Congress could have diminished the value of the entire railroad in some other way by an amount equal to the value of the station. Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (although rent control may diminish the value of rental property, a rule requiring lessors to dedicate part of their property to a particular use is still a taking).

Whether a diminution in value is a taking depends at least in part on whether the government's regulatory objectives entail that diminution. We assume that if the ICC had found CNW's bid unacceptable because CNW's ownership of the lines would disrupt transportation or create excessive market power, this decision, although very costly to CMC, would not have "taken" its property. But the ICC did not disqualify CNW. The court's decision therefore was not compelled by the regulatory system. Consider the point from a different angle. The system of regulation governing the railroads may explain why Soo bid only $570 million (and CNW only $780 million) rather than some higher figure such as $1 billion. The difference between $780 million and $1 billion—the value the Milwaukee's rail assets might have if free from regulation—is not a taking. See *In re Valuation Proceeding,* 445 F. Supp. at 1022 & n.35. The bids that were before the district court already reflected the cost to CMC of federal and state regulation. The diminution in the bids did not immunize a *further* reduction in the name of national defense, trade with Canada, or other objectives of the court's choosing.

So when does error "take" property? Suppose agents of the FBI, while chasing a kidnapper, demolish someone's car, or suppose a postal van runs over a child's tricycle. Do these accidents "take" the car and tricycle? Certainly they are casualties of the operation of government. Yet despite the contention that all torts by the government are takings, see Richard A. Epstein, Takings: *Private Property and the Power of Eminent Domain* 35-56 (1985), the Supreme Court has distinguished the two. E.g., *Keokuk & Hamilton Bridge Co. v. United States,* 260 U.S. 125 (1922) (damage to a bridge caused by the government's blasting is not a taking); *YMCA v. United States,* 395 U.S. 85 (1969) (damage to a building caused by using it as a military command post during an insurrection in Panama is not a taking). Accidental, unintended injuries inflicted by governmental actors are treated as torts, not takings. And torts are compensable only to the extent the Federal Tort Claims Act permits. The Court has never treated limitations on liability in tort as mere pleading obstacles, to be surmounted by shifting ground to the Tucker Act. See *United States v. James,* 106 S. Ct. 3116

(1986); *Kosak v. United States*, 465 U.S. 848 (1984); *Laird v. Nelms*, 406 U.S. 797 (1972).

The question is whether the program, properly carried out, would be permissible. For example, if planes owned by the government regularly overfly a farm, causing the chickens to kill themselves in fright, this planned operation may "take" an easement across the farm. *United States v. Causby*, 328 U.S. 256 (1946). But if a stray military plane crashes into a chicken coop, killing an equal number of fowl, this is a tort rather than a taking, and compensation depends on the extent to which the Tort Claims Act provides relief. Similarly, if in order to go into the dairy business the government condemns a herd of cattle, that is a compensable taking; if the government condemns the herd to stamp out an infectious disease, that is not a taking (both because the disease is the principal cause of the loss and because there are reciprocal benefits in the program of disease control), see *Miller v. Schoene*, 276 U.S. 272 (1928); and if the government kills a given animal mistakenly thinking it diseased, that is a tort rather than a taking. Had the government carried out the program accurately and distinguished the healthy from the diseased, there would have been no taking; a foul-up in the implementation of the program does not require compensation outside the scope of the Federal Tort Claims Act. See *Langford v. United States*, 101 U.S. 341, 344-45 (1879), holding that when agents of the United States wrongly believe that the government owns some land, and occupy it under a claim of right, the occupation is a noncompensable tort rather than a taking. Authorized acts of the government may be takings, the Court concluded, but unauthorized or mistaken ones are torts for which the officer alone is answerable (unless immune). Compare *United States v. Great Falls Manufacturing Co.*, 112 U.S. 645, 656-58 (1884).

So too with unnecessary searches and seizures (those supported by probable cause but that turn up no evidence), *YMCA*, 395 U.S. at 92 (dictum), cf. *Baker v. McCollan*, 443 U.S. 137 (1979) (arresting the wrong person, though with probable cause, does not violate the Constitution), with unfortunate criminal prosecutions (those in which the charge was warranted but the jury acquits or a conviction is reversed), and with the long list of other governmental acts that can cause deep injury if committed in error. None of these costly errors is a taking, and by parallel reasoning a judicial error in the implementation of a program is not a taking, if a correct implementation of the program would not be a taking.

A parallel line of cases dealing with the Due Process Clause comes to the same conclusion. The Takings Clause does not apply directly to the states, see *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), but the Supreme Court has used the Due Process Clause of the fourteenth amendment to supply a similar set of rules, see *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233-41 (1897); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Due Process Clause forbids the state to "deprive" a person of "property" save with certain process. Process sometimes misfires. The state may err in the administration of its programs, misunderstand the facts or misconstrue the law. Do these errors violate principles of due process? "[A]n erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law". *Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895) (collecting cases). See also, e.g., *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); *Davidson v. New Orleans*, 96 U.S. 97, 104-05 (1877); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 563-64 (7th Cir. 1986); *Toney-El v. Franzen*, 777 F.2d 1224, 1227-28 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2909 (1986). Mistaken applications of the law are inevitable, but no principle of constitutional law requires compensation for every mistake. *Daniels v. Williams*, 106 S. Ct. 662, 665 (1986); see also *Carson v. Block*, 790 F.2d 562, 565 (7th Cir. 1986) (collecting cases holding that the Constitution does not require states to follow their own laws).

There are other illustrations, but the point has been made. The government is not absolutely liable for mistaken implementation of a law that does not otherwise take property. Were it otherwise, the Treasury would guarantee the accuracy of all administrative and judicial decisions. That was certainly not the understanding in 1791, when the Takings Clause was added to the Constitution; to the contrary, there was consensus that the sovereign could not be sued for errors save with its consent. We do not think that the Takings Clause, unbeknownst to all, established a principle of governmental liability for mistakes in the implementation of federal programs. The principle would have substantial effects, too large to escape notice in 1791 (and since). Many decisions are effectively unreviewable or cause damage before they may be reviewed. When the FTC announces its opposition to a merger, this may lead the merging parties to abandon their plans; they may not turn around and collect damages on the ground that the FTC holds mistaken views about the antitrust laws. If the Antitrust Division should get a preliminary injunction that blocks the merger, the interim order may doom the plans even if the court of appeals later reverses; here the judge's error is established, but the error does not expose the United States to a suit under the Tucker Act, because the antitrust laws, when *properly* carried out, do not take property. (No one has a legitimate claim of entitlement to monopoly profits.) Pretrial detention, the grant of a motion to compel extensive discovery in a securities case, these and many more may inflict great injury, and erroneous decisions by district judges may escape effective review.

A rule requiring the Nation to bear the costs would not reduce the number of errors or the incidence of their costs. It would, however, produce much litigation as people tried to tap the Treasury by showing judicial error. A rule of cost shifting via the Takings Clause might even increase the number of judicial errors. People would fear judicial error less and so would do less to prevent it. Knowing that they could turn to the Treasury for relief, people would be tempted to skimp on developing the record and briefing the case to get it right the first time. One reason for res judicata and other rules of preclusion is to induce parties to concentrate their energies on a single full and fair contest in which error will be held to a minimum. So, too, a rule foreclosing resort to takings litigation may improve the quality of the initial litigation. A principle that the adequacy of the rule of decision, and not its implementation in a given case, controls the constitutional question, will do the trick.

The Milwaukee Railroad Restructuring Act neither requires nor authorizes a judge to transfer property for compensation that is less than the constitutional minimum. The Restructuring Act is thus unlike the statute at issue in the *Regional Rail Reorganization Act Cases*, which not only required a transfer without a prior finding of adequate value, see 419 U.S. at 155, but also could have caused a taking by the erosion of value during the judicial proceedings, *id.* at 122-25. The Restructuring Act makes adequate compensation a condition of any sale. The ICC believed that it should not approve any bid less than the fair market value of the Milwaukee's rail assets. It found that a bid of $570 million was fair market value. The district court, too, proceeded as if the rule of decision were: "Choose from among the bidders that have offered at least the fair market value of the Milwaukee's rail assets." The court determined that the Soo's bid matched the fair market value. If the court was right, then the sale to the Soo did not take CMC's property. For the reasons we have given, a judicial error in answering a constitutionally appropriate question does not subject the United States to a claim of taking. We therefore have no reason to vacate paragraph 4 of the district court's order.

It is unsettling to contemplate the prospect of $210 million gone without redress—without even full appellate review of the decision to sell to the Soo. But we cannot undo the sale now, and to treat judicial error as a "taking" has no support in the history of the Constitution or the first 200 years of its interpretation. The size of an error (if there was one) does not justify constitutional innovation; modern exigency does not authorize courts to change the rules established at the beginning. The $210 million in one case is not different in principle from 210 cases, each of which entails $1 million worth of useless discovery under a court's directive, or a million bicycles crushed by postal trucks.

We can imagine cases that test the limits of our approach. Suppose the disparity between market value and the price approved by a judge were so great that the purchaser would not even count as a "good faith purchaser for value" under the Uniform Commercial Code (for example, the person who buys a gold watch for $20 from a seller displaying an ample supply on the inside of a trench coat). Then a court might say that the sale could be undone under §363(m), or that the disparity of value is so great that the court must have been dissembling in saying that it was trying to apply the constitutional standard. None of these hard cases is before us. The ICC found the value sufficient, and $570 million—a price earnings multiple exceeding that of other operating railroads—is not so shockingly deficient to call a limiting rule into play. This was a real sale, not a purchase from a fence or disguised judicial charity.

II

A

The purchaser of a line of railroad usually finds it encumbered with conditions designed to protect the jobs (or at least the income) of the line's employees. The ICC recommended that the sale of the Milwaukee's rail properties be accompanied by rules referred to as the *New York Dock* conditions, after *New York Dock Ry.—Control,* 360 I.C.C. 60 (1979), aff'd under the name *New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979). It is not important to recount just what these are. See *Simmons v. ICC,* 760 F.2d 126, 128-29 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 791 (1986), for a compact description. The Soo, which projected eliminating 670 jobs entirely by attrition and early retirement, agreed to be bound by them, and the ICC said that they were enough, rejecting the argument of the Railway Labor Executives' Association (RLEA). The RLEA maintained that not only the Soo's new employees but also employees of other railroads affected by new competition from the Soo should be protected; the ICC disagreed. The RLEA also wanted protection for employees on furlough at the time of the transfer; the ICC decided that only employees active at the time of the sale or recalled to work thereafter should be protected.

The district court was authorized by the Restructuring Act, 45 U.S.C. §904(b)(1), to decide for itself what labor protective conditions should be imposed. The statute provides: "In authorizing any sale or transfer, the court shall provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49 of the United States Code." The CNW proposed that the district court use its authority to implement a different set of conditions, called the "Appendix B" conditions. The Trustee supported these conditions for CNW's bid. Although the district court did not approve CNW's bid, it chose the "Appendix B" conditions, while lawyers for the Soo looked on in silence. The principal difference between the "Appendix B" conditions and the *New York Dock* conditions is that although *New York Dock* requires the railroad to notify employees of impending changes 90 days in advance, and to negotiate with the unions concerning their consequences until agreement is reached, "Appendix B" shortens the time to ten days and allows the railroad to make the changes whether or not the unions consent. "Appendix B" also requires that any employee injured by this accelerated schedule be made whole. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 658 F.2d 1149, 1151-52 (7th Cir. 1981) (*Protective Conditions*), *cert. denied*, 455 U.S. 1000 (1982), for a description of the difference. (The Soo represents that this is the *only* difference between "Appendix B" and *New York Dock* conditions, a position to which we expect the Soo to adhere.) The order of February 1985 transferring the rail operations to the Soo contained a freeze of at least 90 days on all operational changes, so the full set of protective conditions is "Appendix B" plus the initial freeze.

The RLEA protests that the district court moved in the wrong direction; it should have made the conditions more rather than less favorable to labor. The "Appendix B" conditions, the RLEA insists, are illegal because less "protective of the interests of employees" than the minimum under 49 U.S.C. §11347. The RLEA also challenges two related decisions. After the Soo bought the line, the RLEA asked the ICC to disapprove the Milwaukee's final plan of reorganization, on the ground that the Milwaukee had not adequately provided for workers who agreed to defer increased wages during the reorganization. The RLEA wants the Milwaukee to repay the workers 130% of these deferrals. The ICC dismissed the petition, concluding that once the Milwaukee had transferred its rail operations to the Soo, the Milwaukee was no longer a railroad subject to the ICC's jurisdiction. The RLEA also asked the district court to disapprove the plan of reorganization, but the court confirmed the plan. The "Appendix B" conditions and the ICC's dismissal of the petition are before us for decision; the objections to the confirmation of the plan are not.

B

The RLEA's request that we order the Soo to assume the *New York Dock* conditions is moot. Former Bankruptcy Rule 8-703(a)(6), which applies to the last stages of this reorganization under §77 of the Bankruptcy Act of 1898, 11 U.S.C. §205 (1976), provided:

> Unless an order approving a sale of property . . . is stayed pending appeal, the sale to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser . . .. knows of the pendency of the appeal.

The Bankruptcy Code of 1978 codifies this rule in 11 U.S.C. §363(m), which uses similar language. Several parties, including the RLEA, asked us to stay the sale to the Soo; the request was refused, and the sale was closed on February 20, 1985. The imposition of the *New York Dock* conditions would "affect" the sale just as surely as a sudden increase in the price would affect it, and former Rule 8-703(a)(6) therefore forbids us to grant the relief the RLEA proposes. See also *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 641 F.2d 482, 484-86 (7th Cir. 1981) (rejecting on the basis of Rule 8-703(a)(6) a challenge to the sale of some of the Milwaukee's property).

RLEA tries to escape the operation of the Rule by contending that the Soo is not a "good faith purchaser", but this will not wash. Only fraud, collusion, or knowledge of the illegality of the sale defeat "good faith". *In re Magwood,* 785 F.2d 1077, 1081 n.6 (D.C. Cir. 1986); *In re Rock Indus. Machinery Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978). See also *In re Sax,* No. 85-2925 (7th Cir. July 22, 1986), slip op. 6-7 (sale need not be "proper" to be sheltered; it need only be "authorized"). The Rule and §363(m) enable the bankruptcy court to promise the purchaser that it will get a good title and thus reduce the risk the purchaser must assume. Once the bidders know what they will get, they can bid its full market value; if the sale were subject to subsequent amendments, the bidders would reduce their valuations by the anticipated cost of accommodating these changes. *Sax*, slip op. 6. A reduction in the risk leads to higher bids, to the benefit of the bankrupt estate.

That there may be a fair debate about the order of sale does not undercut good faith. The statute and the rule are concerned only with incorrect orders, those reversed in fact. (Correct orders will be affirmed, so there will be no change in the conditions of the sale with or without the Rule and §363(m).) Orders that are reversed surely were subject to fair debate. Yet both Rule and statute specify that knowledge of the pending appeal does not prevent the sale from being final. This means that the buyer's knowledge that the court has resolved a debatable issue—even resolved it incorrectly—does not prevent the buyer from taking the property in good faith. Our decision in *In re EDC Holding Co.*, 676 F.2d 945 (7th Cir. 1982), one of the few cases ever to find "bad faith" under a statute similar to Rule 8-703(a)(6), relied not only on the party's knowledge of illegality but also on an appearance that the party seeking shelter from the rule had used it to improve its position compared with other creditors. Nothing of the sort took place here. A party does not "know" to be illegal whatever turns out to be so. The knowledge component of this test is more like the sort of knowledge that leads to criminal liability (people "know" that wages are taxable even if they have deceived themselves into thinking they are not) or the sort of specious position that leads to the imposition of sanctions in litigation.

The Soo is a third party that made a bona fide bid, and the Soo did not know that the "Appendix B" conditions were illegal. To the contrary, *Protective Conditions* held that the district court possessed the discretion to use the "Appendix B" conditions in connection with the sale of one line of the Milwaukee's track, and *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 756 F.2d 508, 515-16 (7th Cir. 1985) (*Soo Intervention*), held that the portions of the Restructuring Act allowing the sale of any line of track also allow the sale of the whole rail system of the Milwaukee. *Protective Conditions* and *Soo Intervention* together give the Soo a strong argument that the "Appendix B" conditions may be applied to the sale of the whole railroad. Whether this argument is strong enough we need not say; all we decide is that it precludes a conclusion that the Soo is not a "good faith purchaser" under the Rule.

Although it might be said that the Soo and the Trustee closed the sale in great haste, just hours after this court denied the RLEA's application for a stay, that does not subtract from the Soo's good faith. That term of art has nothing to do with the speed at which a transaction proceeds—at least not if the parties wait long enough to allow the court of appeals to act on the application for a stay.

Once this court had refused to stay the sale, it made no difference whether the deal closed the next hour or the next month. And although RLEA also argues that the district court's order was so erroneous that the court lost its "jurisdiction," *Sax* disposes of this position. The district court had jurisdiction to determine its authority to do what it did, which shelters the purchaser at the sale.

There has been some debate among the parties about whether labor conditions imposed on the Milwaukee in 1936 survived the sale to the Soo. This question was not decided by the district court and is not properly before us. The motion to supplement the record is denied.

C

In March 1985 the Trustee petitioned the ICC under §77(d) of the old Bankruptcy Act to clarify its role in reviewing the Milwaukee's final plan of reorganization into a real estate corporation (CMC). The Trustee argued that approval was unnecessary because the Commission's earlier decisions had approved every significant feature of the plan of reorganization. The RLEA opposed the petition. In April 1985 the ICC dismissed the Trustee's petition on the ground that because the Milwaukee had sold its rail operations to the Soo, it was no longer a railroad and was not within the Commission's jurisdiction. Fin. Dkt. No. 28640 (Sub-No. 9), ____ I.C.C.2d ____ (1985).

The RLEA does not maintain that by April 1985 the Milwaukee was still a railroad, and §77, with its approval provision, is limited to railroads. RLEA insists, however, that the Milwaukee had to be treated as if it were a railroad because the sale of the rail assets in February was illegal. This is so, RLEA says, because rail assets of a bankrupt railroad may be sold only as part of the plan of reorganization under §77 of the 1898 Bankruptcy Act. The Soo took under the Milwaukee Restructuring Act, not the Bankruptcy Act, so according to the RLEA the ICC still needed to approve a reorganization under the 1898 Act. This requirement of approval becomes the hook that the RLEA proposes to use to require CMC to pay additional sums to its former workers to make up for what they deferred or lost during the reorganization and sale of the railroad, perhaps even to get the *New York Dock* conditions.

To the extent the RLEA wants to use the process of approving and confirming the plan to change the conditions under which the Soo took the rail assets, the claim is moot for reasons we discussed above. To the extent the RLEA wants the ICC to impose conditions on CMC as a condition of approval of the plan, it loses because we held in *Soo Intervention*, 756 F.2d at 515-16, that the provisions of the Restructuring Act could be used to sell the whole railroad. We are not disposed to reexamine *Soo Intervention*. See also *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 701 F.2d 604, 607 (7th Cir.) (emphasizing that a purpose of the Restructuring Act was to allow the court to sell the Milwaukee's rail assets quickly), *cert. dismissed*, 463 U.S. 1233 (1983). The Restructuring Act required the district court to get the ICC's views, just as §77(d) the Bankruptcy Act called for the ICC's views on a plan of reorganization. The Restructuring Act changed the rules, however, by allowing the district court to make its own decision in the end. Here the district court took the ICC's advice and sold the lines to the Soo. The district court had the authority to turn the Milwaukee into a real estate company on its own. The RLEA treats the Restructuring Act as a second hoop through which everyone had to jump, but Congress meant it to streamline the §77 procedures. Compliance with the Restructuring Act is sufficient to transfer the rail properties; the parties need not obtain a redundant clearance under §77.

There is no doubt that by April 1985 the Milwaukee was not operating a railroad. Section 77(d) refers to "the debtor", and this might be the basis of a contention that the Milwaukee remained subject to §77(d) even though it was no longer a railroad, needing the ICC's permission to get out of bankruptcy. The ICC reads the statute otherwise, however, and its interpretation is entitled to respect. *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1108 (1985); *Watkins v. Blinzinger,* 789 F.2d 474, 478 (7th Cir. 1986). The ICC has said its piece on this reorganization. Section 77(d) of the Bankruptcy Act was designed to ensure that the ICC could control railroad reorganizations. The ICC dominated this one, prevailing on every issue except the *New York Dock* conditions. It had nothing more to say, and an interpretation that would apply §77(d) to firms that are not railroads any longer, despite the ICC's protestation that it does not want to review anything, would not have any plausible function.

D

The district court confirmed the Milwaukee's plan of reorganization on July 12, 1985. The RLEA and several other parties have filed appeals from the order confirming the plan. Although many of the RLEA's arguments about the order of sale and the ICC's refusal to review the plan go to the merits of that plan, the RLEA's appeal from the confirmation is not before us. It and all other appeals have been consolidated for separate disposition. We have disposed of RLEA's arguments on jurisdictional grounds. Nothing we say here bears on the merits of any appeal from the order confirming the plan, and we mean to leave no clues about what our views might be.

III

A

The rail assets of the Milwaukee included rights to run trains between Bedford and New Albany, Indiana, over the track of the Seaboard System. These trackage rights enabled the Milwaukee to serve Louisville, Kentucky, and in the hands of the Soo (and the Canadian Pacific) apparently will offer formidable competition to the Seaboard, which otherwise might pick up the traffic in Chicago. The district court transferred these trackage rights to the Soo over the Seaboard's opposition, and the Seaboard asks us to annul the transfer on the ground that the trackage rights agreement contains a clause allowing assignment only if the Seaboard concurs—which it certainly does not.

The trackage rights arose out of the acquisition of the Monon R.R. by the Louisville & Nashville R.R., one of the Seaboard's predecessors. The acquisition would have given the L&N, which operated a single-line route between Chicago and Louisville, another. The ICC feared that this would reduce competition, and it ordered a protesting L&N to grant the Milwaukee trackage rights from Bedford to New Albany (which is across the Ohio River from Louisville). *Louisville & Nashville R.R.—Merger—Monon R.R.*, 338 I.C.C. 134, 145-56, 168-69, 185 (1970). The Milwaukee had a line from Chicago to Bedford; with the trackage rights, it could offer single-line service from Chicago to Louisville in competition with the L&N. The ICC stated that it would not approve the acquisition unless the L&N granted trackage rights; the L&N consented and completed the acquisition.

The L&N and the Milwaukee had trouble agreeing on the terms of the trackage rights, so in 1973 the ICC dictated them. *Chicago, Milwaukee, St. Paul & Pacific R.R.—Trackage Rights*, 342 I.C.C. 578, aff'd under the name *Louisville & Nashville R.R. v. United States*, 369 F. Supp. 621 (W.D. Ky.) (three-judge court), aff'd mem., 414 U.S. 1105 (1973). The L&N wanted a time limit on the trackage rights, a prohibition against their sale or assignment by the Milwaukee, and automatic termination in the event of the Milwaukee's merger, consolidation, or bankruptcy. The ICC declined to accept these proposals. It explained in part, 342 I.C.C. at 595, 600-01:

> [I]t is difficult to perceive how any change may come about in Milwaukee's status which would have such adverse effect on L&N and its interest to require summary termination of trackage rights operations. . . . [T]he Commission's authorization must first be obtained before Milwaukee may merge or consolidate, or fall under common control, with any other carrier,

> and L&N would have ample opportunity in appropriate proceedings before the Commission to oppose acquisition of control by competing railroads over the Milwaukee trackage rights.
>
> . . . .
>
> Milwaukee is here the instrument of the Commission's policy, in the public interest, to foster competition among railroads in a particular situation, and the trackage rights operations authorized should be permitted, and indeed required, to continue just so long as that policy is valid and serves the public interest. On petition of the parties, or either party to the agreement, . . . the public interest may be reconsidered or reexamined at any time, and the appropriate action taken to modify the terms of the agreement or to require termination thereof.

L&N and the Milwaukee then signed a trackage rights agreement. Paragraph 14 reserves the ICC's jurisdiction to alter or terminate the agreement. Paragraph 15, which was added to the agreement after the ICC's opinion, provides:

> This agreement and all rights granted hereunder to Milwaukee Company may not be transferred or assigned, in whole or in part, unless Louisville Company, its successors or assigns, shall consent in writing thereto. Any such attempted transfer or assignment, in whole or in part, shall be void and of no effect.

Paragraph 13 contains a clause providing for arbitration of "any difference or dispute" concerning the terms of the agreement or operations using the trackage rights.

Before the ICC considered the three proposals to acquire all of the Milwaukee's rail operations, it published a notice in the Federal Register, 49 Fed. Reg. 12333 (Mar. 29, 1984), that invited interested persons to comment. The Seaboard did not, although it does not deny that it had actual notice of the proceedings before the ICC. The ICC's orders of September 1984 (approving a sale to the

Soo) and January 1985 (approving both the Soo and the CNW) are crammed with descriptions of trackage rights and conditions on transfers. Although they mention the Milwaukee's trackage rights to New Albany, the orders do not discuss their transfer to the Soo or the CNW. This is no surprise, because no one asked the ICC to consider the propriety of the transfer.

The Seaboard, which was not a party to the reorganization, then asked the court to forbid a transfer of the trackage rights to the Soo or the CNW. There followed some confusing exchanges. At the oral argument held on February 7 to discuss the terms of the transfer, the court recognized that the ICC had not addressed the Bedford-New Albany trackage rights and asked the Trustee whether the Asset Purchase Agreement (the complex document establishing the terms of the sale) would extinguish the Seaboard's claims. The judge asked: "Wouldn't the Trustee makes [sic] his conveyance without warranties, simply convey whatever rights he has and let the purchaser worry about that?" Counsel for the Trustee answered: "[T]hat is exactly the type of conveyance that is being considered. But the Seaboard is asking this Court to decide the issue."

The matter was dropped until the next day, when the court read findings and conclusions from the bench. The court stated that the "Trustee is, of course, only going to convey what rights in interest he has", that the dispute with the Seaboard "will have to be resolved by the acquiring carrier", and that "[i]f the Seaboard believes they are not transferable, they will have to litigate that or make some kind of arrangement with the Soo." The full statement, including some exchanges with counsel, appears in *Seaboard System R.R. v. Soo Line R.R.*, No. C-85-1569-A (N.D. Ga. May 28, 1986), slip op. 20-24 n.8. After hearing this, Seaboard doubtless thought it had won, and on February 14 it intervened to secure the spoils.

It was sadly disappointed, because paragraph 9 of the court's formal order approving the sale (Order No. 809), entered on February 19, stated that "[t]he assignment and assumption of the trackage agreements . . . pursuant to the [Asset Purchase Agreement] will not effect a termination of the Trustee's rights and interests . . . , and those rights and interests are assignable to Soo and [its subsidiary] in accordance with the terms of the [Asset Purchase Agreement], and notwithstanding any provisions in any such contracts, leases or agreements to the contrary." On seeing this clause counsel for the Seaboard protested that the court was snatching back the permission it had granted the Seaboard on February 8 to continue in another forum its dispute with the Soo about the effect of the transfer. The court eliminated from the draft of paragraph 9 the word "fully" before "assignable" but otherwise rebuffed the Seaboard's arguments. On the one hand the judge said that Order No. 809 "leave[s] the matter open to subsequent litigation" and on the other remarked that the Order "means they are assignable. I don't see what prejudice the Seaboard sustains, particularly having been silent when they had an opportunity to raise the question before the ICC." Then the judge suggested a middle ground, that the Order tells the Seaboard "[t]hey can go to the Commission or they can go to the Soo" to seek relief. Understandably frustrated by all this back-and-forth, the Seaboard requested relief from Order No. 809. On March 25, without explanation, the court entered a minute order denying the Seaboard's request.

The Seaboard meanwhile filed suit in the Northern District of Georgia, asking for an order compelling the Soo to arbitrate the transfer and for a declaratory judgment that the transfer violates the clause requiring the Seaboard's consent. The court held, *Seaboard v. Soo, supra,* that both requests are barred by claim preclusion. Either the reorganization court resolved them adversely to the Seaboard in Order No. 809 or the Seaboard, having intervened, should have sought from the reorganization court its declaratory judgment and order to compel arbitration. Either way, the Georgia court concluded, the Seaboard was not entitled to move its dispute to a new forum and try again.

B

What is before us for review? No. 85-1573 is Seaboard's petition to review the January 1985 decision of the ICC to the extent it approved the transfer of the trackage rights. The Commission, which did not mention the transfer, contends that the Seaboard has not preserved a challenge yet insists that it indeed approved the transfer. The ICC approved the transfer in the sense that it approved the Soo's proposal. But whether the Milwaukee had a right to transfer the Bedford-New Albany rights without the Seaboard's approval was not raised, litigated, or decided. The Commission's silence does not construe or modify its orders of 1970 or 1973, or the terms of the contract between Milwaukee and the L&N. Yet the Seaboard is not entitled to contest this non-decision. If it had been a party, its challenge to the ICC's order would be precluded by the rule that a party seeking to raise an issue in court must first raise it before the agency. E.g., *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Illinois Commerce Commission v. ICC,* 776 F.2d 355, 362-63 (D.C. Cir. 1985) (Scalia, J.). The Seaboard was not a party, however, and its challenge is barred by the even more fundamental principle that only a party before the Commission may seek judicial review of its orders. See 28 U.S.C. §§ 2342(5) and 2344 (limiting review to a "party aggrieved" by the order); see also *Radiofone, Inc. v. FCC,* 759 F.2d 936 (D.C. Cir. 1985) (Scalia, J.); *Simmons v. ICC,* 716 F.2d 40, 42-43 (D.C. Cir. 1983). No. 85-1573 must be dismissed for want of jurisdiction.

One court has suggested that despite §2344 a non-party may obtain judicial review of "agency action [that] is 'attacked as exceeding the power of the [ICC].' " *American Trucking Associations, Inc. v. ICC,* 673 F.2d 82, 85 n.4 (5th Cir. 1982), *cert. denied,* 460 U.S. 1022 (1983). This decision cited only two cases before the Administrative Procedure Act that had allowed a non-party to bring an independent suit in district court seeking an injunction. *Edward Hines Yellow Pipe Trustees v. United States,* 263 U.S. 143, 147-48 (1923); *Skinner & Eddy Corp. v. United*

States, 249 U.S. 557, 562-63 (1919). We need not know the health of these cases, see *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 (1984), to be confident that non-parties may not seek judicial review in the courts of appeals under the Hobbs Act. A suggestion that non-parties may obtain review of orders that "exceed the power" of the agency is dubious for several reasons. One is that "exceeding the power" of the agency may be a synonym for "wrong," so that the statute then precludes review only when there is no reason for review anyway. We doubt that this is what Congress meant. Another is that §2344 is the source of the court's jurisdiction, and jurisdiction means power to decide. A court may not decide a case just because that would be a good idea; power must be granted, not assumed. *In re Chicago, Rock Island & Pacific R.R.*, No. 85-2505 (7th Cir. June 24, 1986), slip op. 10-11. If a non-party tried to appeal from a judgment of a district court, we would dismiss the appeal no matter how much in "excess of power" the decision might be; if a party tried to appeal after the time for appeal had expired, the clarity of the district court's error would not supply the missing power to adjudicate the appeal. *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978). So it is with review of administrative action. The statute limits review to petitions filed by parties, and that is that. (The Administrative Procedure Act's provision for judicial review, 5 U.S.C. §702, on which Seaboard relies, does not supply jurisdiction in any court, let alone authorize direct review in the court of appeals. See *Califano v. Sanders*, 430 U.S. 99, 104-07 (1977). Only §2344 and the associated provisions of the Hobbs Act authorize the type of review Seaboard requests.)

This does not mean that a non-party adversely affected by an agency's decision has no recourse. If the ICC should purport to invalidate the Seaboard's certificates of public interest, convenience, and necessity in a footnote to a case involving only the Burlington Northern—without notice to the Seaboard that its interests could be affected—the Seaboard could take either of two approaches. One is to intervene before the ICC as soon as it learns of the Commission's action, file a petition for rehearing in the agency, and then seek judicial review under §2344. The other is simply to ignore the order. Then it could not petition for review in the court of appeals, but if the ICC should try to enforce its order, the Seaboard could resist during the enforcement proceeding. This is the same principle that allows a party to ignore a judicial proceeding when the party believes the court lacks jurisdiction, and then to resist enforcement of the court's order. See *Restatement (Second) of Judgments* §81 (1980) (an order entered without notice or jurisdiction does not bind a subsequent tribunal). But this is not a case in which the Commission proceeded without notice to Seaboard; it had actual notice. It is not a case in which the Commission lacked "jurisdiction" to decide; it was authorized to act on the Soo's request.

C

We have jurisdiction of Seaboard's appeal from Order No. 809, but the Soo insists that the appeal is moot because we may not alter the terms of the sale. If the district court had decided that the Soo has a clean title to the trackage rights, free of any claims under the contract between the Milwaukee and the L&N, the case would be moot for the reasons given in *Sax* and Part II.B. of this opinion. But we do not read Order No. 809, in conjunction with the district court's varying explanations of it, as precluding any claim arising under the contract. The terms of the sale are fixed by the Asset Purchase Agreement as well as Order No. 809, and in another case dealing with the transfer of trackage rights to the Soo we held that the Asset Purchase Agreement requires the Soo to arbitrate differences arising out of clauses in trackage rights agreements that restrict the Milwaukee's ability to transfer its rights. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 784 F.2d 831 (7th Cir. 1986) (*Escanaba I*); *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 789 F.2d 1281 (7th Cir. 1986) (*Escanaba II*).

Many of the Milwaukee's assets had encumbrances. Property came with liens; some property had been leased to others; the Milwaukee's leaseholds came with time limits; and trackage rights came with arbitration clauses and restrictions on assignment. See *Escanaba I* and *II*. CMC and the ICC agree that the Asset Purchase Agreement and Order No. 809 do not obliterate the encumbrances on the Milwaukee's property. The Soo got no more than the Milwaukee had.

Order No. 809 does not eliminate the Milwaukee's liabilities arising out of its rail operations; the Asset Purchase Agreement transfers them to the Soo. A claim arising out of breach of the trackage rights agreement between the Milwaukee and the L&N is a liability transferred to the Soo. The principal effect of paragraph 9 of Order No. 809 is to transfer the operating rights to the Soo in the interim, not to foreclose any other claim.

D

Order No. 816 qualifies Order No. 809 with respect to some trackage rights between Crivitz and Marinette, Wisconsin. The district court ordered the Soo to arbitrate with another railroad concerning the transfer of these trackage rights. See *Escanaba I* and *II*. The Seaboard wanted the trackage rights between Bedford and New Albany carved out as well. We do not think the district court was required to treat the Indiana trackage rights the way it did the rights in *Escanaba I* and *II*.

The Seaboard, unlike the Escanaba, did not ask the reorganization court for an order compelling the Soo to arbitrate the disputes growing out of the transfer. More, the contract between the Milwaukee and the Escanaba was a private undertaking. The ICC had expressed no concern about whether the Soo or the Escanaba ran trains over the Crivitz-Marinette line, and it approved the transfer of rights to the Escanaba. The trackage rights between Bedford and New Albany were crammed down the throat of the L&N as a condition of its acquisition of the Monon, and the ICC then fixed the terms of the rights. The Commission expressed the view that the Seaboard should face competition between Chicago and Louisville and that the trackage rights should continue as long as the need for competition continues.

Because the Bedford-New Albany rights exist at the insistence of the ICC, that agency may have primary jurisdiction to construe the contract between the Milwaukee and the L&N. We do not decide whether primary jurisdiction applies because the Commission has asked us not to do so. Even though the district court may have been authorized to construe the contract as an original matter, it was required to do so with care, lest it undermine the purposes the ICC sought to achieve in 1970 and 1973. Any construction of the contract that would allow the Seaboard to block a transfer as part of a reorganization would cut at cross purposes with the ICC's decision not to allow the Milwaukee's bankruptcy or reorganization to end the trackage rights. By transferring operating rights to the Soo without foreclosing all later disputes, the district court allowed the competitive rail service to continue pending an application by the Seaboard to the ICC to terminate the rights. This was the appropriate course of action, and it is how we interpret Order No. 809.

The Seaboard insists that the district court "exceeded its jurisdiction" in approving the transfer, but there was jurisdiction aplenty under the Restructuring Act and the Bankruptcy Code. The Seaboard means only that the district court erred. See also *In re Sax, supra.* And we do not think the court erred. It would have been unreasonable to construe the contract the way the Seaboard does, as giving it the right to veto any assignment of the rights in reorganization. The ICC refused it this right, and the reasons for the competitive operations survive. Clauses requiring approval for assignments do not apply to mergers, see *United States Shoe Corp. v. Hackett,* 793 F.2d 161, 165 (7th Cir. 1986). The sale of the whole rail operation in reorganization is closer to a merger than to the sale of trackage rights standing alone—the paradigm for application of paragraph 15 of the contract. We need not consider whether these arguments are dispositive; they are enough to suggest the wisdom of passing operating rights to the Soo while leaving further problems of interpretation to the ICC. Order No. 809 does not bar an application to the ICC or any changes that agency may wish to make. It does, however, bar any other form of collateral attack on the transfer of the trackage rights. The parties have disputed with some vigor the powers, if any, the ICC possesses to construe or alter the contract. We do not pass on these arguments, which will be open on review of the ICC's decision if it is called on to make one.

IV

It all comes down to this: (1) The motion to supplement the record in No. 85-2121 is denied. (2) The Seaboard's petition, No. 85-1573, for review of the ICC's orders is dismissed for want of jurisdiction because the Seaboard was not a party to the ICC's proceedings. (3) The RLEA's petition, No. 85-1953, for review of the ICC's order dismissing the request to approve the Milwaukee's plan of reorganization is denied because the ICC correctly determined that it did not need to approve the plan. (4) The RLEA's appeal, No. 85-1554, from Order No. 809 is dismissed as moot because the RLEA seeks an alteration of the terms of the sale. (5) CMC's and the Milwaukee's appeal, No. 85-1683, from paragraph 4 of Order No. 809 does not establish a reason to vacate the paragraph. Although we do not adopt or reject the district court's conclusion that the Soo paid a constitutionally adequate price, it is inappropriate to facilitate a collateral attack on that judgment in the Claims Court. Appeal No. 85-1683 is dismissed. (6) Paragraph 9 of Order No. 809, to the extent it is attacked by Seaboard's appeals Nos. 85-2122 and 85-2123, is affirmed. (7) The United States, the ICC, and the Soo shall recover their costs.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 20, 1986.

Before

Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*
Hon. Sarah Evans Barker, *District Judge**

No. 85-1683

IN THE MATTER OF:
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,

Debtor

APPEAL OF:
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY and
CHICAGO MILWAUKEE CORPORATION

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 77 B 8999—**Thomas R. McMillen**, *Judge*.

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* The Honorable Sarah Evans Barker, of the United States District Court for the Southern District of Indiana, is sitting by designation.

ORDER

Counsel for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Chicago Milwaukee Corporation filed a petition for rehearing and suggestion of rehearing en banc on October 3, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

In Proceedings for the Reorganization of a Railroad
No. 77 B 8999—**Thomas R. McMillen,** *Judge.*

ORDER NO. 809

Upon consideration of the matter of the sale, pursuant to Sections 4 and 5(b) of the Milwaukee Railroad Restructuring Act ("MRRA"), notice having been given to all parties, of the Rail Assets, as defined in and pursuant to an Asset Purchase Agreement dated April 6, 1984, as amended (the "APA"), to be entered into between Richard B. Ogilvie, not personally, but solely as trustee ("Trustee") of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") and the Soo Line Railroad Company, a Minnesota corporation ("Soo"), and SLRCO, Inc., a Minnesota corporation ("SLRCO"), the Court, acting as the Court of Reorganization for the Milwaukee pursuant to Section 77 of the Bankruptcy Act of 1898 and pursuant to Section 4 and Section 5(b) of the MRRA finds and concludes as follows:

1. Soo and SLRCO filed an application with the Interstate Commerce Commission (the "Commission") seeking approval of a purchase of the Rail Assets. In addition,

Chicago and North Western Transportation Company ("CNW") filed its application seeking the purchase of essentially similar assets.

2. The Commission rendered its decision on September 26, 1984 with respect to the application of Soo and SLRCO to purchase the assets specified in the APA. That decision, *inter alia*, approved the application pursuant to Section 11344(b) of the Interstate Commerce Act, Section 5(b) of the MRRA, and Section 77 of the Bankruptcy Act of 1898. The Commission served its further decision with respect to CNW's modified application on January 11, 1985, which decision incorporated certain portions of its September 26, 1984 decision.

3. The Court has considered the evidence adduced, heard the arguments of counsel, and the oral and written applications of various parties in interest seeking review of and commenting upon the Commission's September 26, 1984 and January 11, 1985 decisions, including those of the Trustee, Burlington Northern Railroad Company, Chicago Milwaukee Corporation, Escanaba and Lake Superior Railroad Company, First National Bank of Chicago (as Indenture Trustee), Grand Trunk Corporation, Bruce E. Hendry and Mobil Oil Corporation, the Commission, LaSalle National Bank (as Successor Corporate Trustee), the City of Milwaukee, Wisconsin, CNW, the Chicago, Milwaukee, St. Paul and Pacific Railroad Bond and Debenture Holders Protective Committee (the "Protective Committee"), Railway Labor Executives' Association, Soo, States of Iowa, Minnesota and Wisconsin Departments of Transportation, the United States, United Transportation Union Local No. 528, Wisconsin Power and Light Company, Green Hills Regional Planning Commission, North Dakota Public Service Commission, Seaboard System Railroad, Inc., Harold E. Spencer, Peter N. Tod-

hunter and Richard James Stevens, State of Missouri, South Dakota Department of Transportation, Coalition to Save The Milwaukee and "Certain Employees for the Milwaukee".

4. Section 5(b)(2) of the MRRA empowers this Court to review the order of the Commission entered under that Section only under Sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5 of the United States Code. The Commission has certified to this Court the full record of proceedings before it in connection with the decision of September 26, 1984 and the decision of January 11, 1985. The Court has considered and reviewed the findings and decisions of the Commission filed with this Court, pursuant to the requirements of those sections. The Court has further considered the allegations of error contained in the petitions for review and comments and has found that the Commission's findings and decisions should be and are approved by this Court, since the findings and decisions were in accordance with law and were not arbitrary, capricious, an abuse of discretion, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority or limitations, short of statutory right, or without observance of procedure required by law.

5. The Court has considered the evidence adduced, heard the arguments of counsel, and the oral and written arguments of various parties in interest expressing a preference for or objecting to the approval of the sale to either the Soo and SLRCO or CNW, including those of the Trustee, Burlington Northern Railroad Company, Chicago Milwaukee Corporation, Escanaba and Lake Superior Railroad Company, First National Bank of Chicago (as Indenture Trustee), Grand Trunk Corporation, Bruce E. Hendry and the Mobil Oil Corporation, LaSalle

National Bank (as Successor Corporate Trustee), the City of Milwaukee, Wisconsin, North Dakota Public Service Commission, CNW, the Protective Committee, Railway Labor Executives' Association, Soo, States of Iowa, Minnesota and Wisconsin Departments of Transportation, Stickney Corporation, the United States, United Transportation Union Local No. 528, Wisconsin Power and Light Company, Green Hills Regional Planning Commission, Seaboard System Railroad, Inc., State of Missouri, South Dakota Department of Transportation, Coalition to Save The Milwaukee and "Certain Employees of the Milwaukee". The Court has considered the Commission's findings with respect to the public interest, the Commission's vote and basis for its preference for the Soo and SLRCO over CNW, the consideration to be paid to the Debtor's estate, the amount of wages to be paid to employees and other relevant matters. The prompt sale of the Rail Assets to Soo and SLRCO for the continued provision of common carrier service in return for the consideration specified in the APA (including the assumption of certain liabilities of the Milwaukee's estate) is in the best interest of the Milwaukee's estate and of ultimate reorganization of the Milwaukee, and is consistent with the public interest.

6. The immediate execution by the Trustee of the APA, and the prompt closing of the transactions in the manner and time contemplated by the APA, are in the best interests of the Milwaukee's estate.

7. The Trustee has issued certain Trustee Certificates during the course of these proceedings which were purchased by the United States Department of Transportation ("DOT") and the Federal Financing Bank pursuant to Sections 505 and 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 and Section 7 of the MRRA. The estate also is liable to the DOT under the

terms of its Series I Redeemable Preference Shares issued in 1977 prior to the Milwaukee filing for reorganization. The Trustee's obligations under the above Trustee Certificates and under the Preference Shares will be assumed at closing by Soo and SLRCO in the manner provided in the APA.

8. The purchase of the Rail Assets together with prior purchases approved by this Court constitute the purchase of substantially all of the Milwaukee Railroad for purposes of Section 7(h)(1)(B) of the MRRA (as amended by Section 701(c)(1) of the Staggers Rail Act of 1980), 45 USC §906(h)(1)(B), and all obligations to the United States or any agency or instrumentality of the United States incurred pursuant to Section 7 of the MRRA by the Milwaukee or the Trustee, including Trustee Certificates 1980 A and B are waived and cancelled.

9. The sale of the Rail Assets and the assignment and assumption of the trackage agreements, joint facilities and operating rights over segments of the rail properties now operated by the Trustee are in the public interest (as determined by the Commission and affirmed by this Court) and are in the best interest of the estate as found by this Court. The assignment and assumption of the trackage agreements, interests in or agreements with respect to joint facilities, leases, operating rights and all other rights and interests of the Trustee being assigned pursuant to the APA will not effect a termination of the Trustee's rights and interests under the contracts, leases and agreements granting those rights and interests, and those rights and interests are assignable to Soo and SLRCO in accordance with the terms of the APA, and notwithstanding any provisions in any such contracts, leases or agreements to the contrary.

10. Section 5 of the MRRA mandates that the Court require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of title 49 of the United States Code. In prior sales of lines of railroad pursuant to Section 5, the Court imposed "Appendix B Conditions" (report of the Special Master dated February 20, 1980) which were found to be as protective as statutorily required and consistent with both the scheme and language of the MRRA by the Court of Appeals for the Seventh Circuit in *Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Consolidated Appeals of Railway Labor Executives' Association*, 658 F.2d 1149 (7th Cir. Aug. 17, 1981), *cert. den.* 455 U.S. 1000 (Mar. 8, 1982).

11. Section 5 of the MRRA does not require that labor protective conditions be imposed with respect to employees of The Milwaukee Motor Transportation Company, and the Court finds that such conditions should not be imposed.

12. The additional findings and conclusions of law, not inconsistent with the provisions of this Order, made pursuant to Rule 52 by the Court orally on February 8, 1985, are incorporated in this Order by reference and made a part of this Order.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the sale and assignment to Soo and SLRCO, in accordance with the APA and this Order, of the Trustee's right, title and interest in the Rail Assets are approved and confirmed in all respects. The Rail Assets shall, upon conveyance, be free and clear of all liens, security interests, claims and encumbrances, of whatever nature, whenever arising, including without limitation

those arising from federal, state and local tax claims or liens, those arising from that certain First Mortgage dated as of January 1, 1944 with Continental Illinois National Bank and Trust Company of Chicago, Indenture Trustee, and the General Mortgage dated as of January 1, 1944 with Harris Trust and Savings Bank, Indenture Trustee, and all mortgages supplemental thereto, except only liens, security interests, claims and encumbrances created by, or specifically permitted to remain on the Rail Assets pursuant to, the APA.

2. That the Trustee is authorized and directed to execute promptly and deliver to Soo and SLRCO the APA, to consummate promptly the sale as set forth in the APA and to execute and deliver on or as soon as practicable after the Closing Date (as defined in the APA), all deeds, bills of sale, assignments, certificates of title, and other documents, and to take such other actions, as shall be required or appropriate to effectuate the transactions contemplated by the APA, including to the extent necessary under the circumstances as determined by the Trustee, modifications to the APA or the transaction required to result in a fully taxable transaction, so that for federal income tax purposes gain or loss will be fully recognized by the Milwaukee on the consummation of the sale, and that the net operating loss carry forwards and tax credits available to the Milwaukee immediately prior to the closing of the sale will be preserved to the Milwaukee.

3. That the Trustee is authorized and directed to assign to Soo or SLRCO, as appropriate, all of his rights under contracts as provided by the APA.

4. That the Trustee is authorized and directed to assign to Soo or SLRCO, as appropriate and in accordance with the APA, all of the trackage agreements, joint facilities

and operating rights necessary for Soo or SLRCO, as the case may be, to operate the Railroad (as defined in the APA).

5. That the Trustee is authorized and directed to assign to Soo or SLRCO, as appropriate, all labor contracts (including collective bargaining agreements) with respect to employees of the Trustee required by the APA to be offered employment by Soo or SLRCO.

6. That Soo and SLRCO, or either of them, assume each of the obligations and liabilities arising under the contracts or agreements assigned by the Trustee in accordance with paragraphs 3, 4 and 5 of this Order. In addition, Soo and SLRCO, or either of them, shall assume the Trustee's obligations under the Wage Deferral Agreement and the last two sentences of Paragraph 2b of the Wage Reduction Agreement, as specified in the APA as modified in the December 4, 1984 letter agreement between the Soo and the Trustee, the obligations of the Trustee under the Trustee Certificates issued to DOT and the Federal Financing Bank pursuant to Sections 505 and 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 or Section 7 of the MRRA (excluding Trustee Certificates 1980 A and B), the obligations with respect to the Series I Redeemable Preference Shares, the obligations of the Trustee with respect to any labor conditions imposed with respect to the transactions contemplated by the APA and other obligations and liabilities of the Trustee to be assumed by Soo and SLRCO, or either of them, pursuant to the APA. After the Closing (as defined in the APA), all obligations and liabilities of the Trustee to be assumed by Soo or SLRCO in accordance with this Order or the APA and not otherwise discharged shall be the sole obligation of Soo or SLRCO, or both, as the case may be, and the Trustee and the Milwaukee

shall be relieved from any and all liabilities in connection with or arising out of such obligations except as expressly may be provided otherwise by the APA, whether occurring after the Closing or arising out of the conveyance or assignment; provided, however, the foregoing shall not impose on Soo or SLRCO any liability or obligation not imposed upon or assumed by them in accordance with the terms of the APA.

7. That all prepetition obligations and debts of the Trustee and Debtor and its subsidiaries to Soo and its subsidiaries are cancelled. In addition, all outstanding debts and obligations of the Trustee and Debtor and any of its subsidiaries arising out of facilities embargoed or abandoned prior to Closing are cancelled.

8. That the sale, transfer and assignment of the Rail Assets is without warranties, representations or guarantees of any kind, expressed or implied, except as specifically stated in the APA.

9. That upon consummation of the transactions contemplated by the APA, all common carrier obligations of the Trustee and Debtor be assumed by Soo and SLRCO, and shall cease as to the Trustee and Debtor.

10. Subject to the agreement of Soo and SLRCO with representatives of employees to labor protection conditions at least as protective as those specified below, the conditions contained in Appendix B to the Report of the Special Master dated February 20, 1980 are adopted for the protection of employees of Soo and Milwaukee Road affected by the transactions contemplated by the APA; Section 4(e) is included therein as specified in Order No 276B; Appendix B is also modified as provided in Order No. 409A. Notwithstanding the foregoing, no labor protective conditions are imposed with respect to the employees of The Milwaukee Motor Transportation Company.

11. That the Court shall retain jurisdiction over this matter for the purpose of implementing and carrying out the APA and resolving any disputes arising under or with respect to the APA, this Order or the Closing. The ICC shall have such continuing jurisdiction over this transaction as is by law vested in it.

12. That the rights, claims, liens and interests of any creditor of, or claimant against, the Debtor's estate which are not assumed by Soo or SLRCO in accordance with this Order or adjudicated by this Order as applying to the Rail Assets which are sold, transferred or assigned pursuant to this Order shall be, upon the Closing, transferred from the Rail Assets to the net proceeds of the sale; such net proceeds shall, until further order of this Court, be deposited and retained in the existing trust account bearing the designation "Escrow Agent Account" No. 13-01043-4 at the Continental Illinois National Bank and Trust Company of Chicago and shall be invested pursuant to this Court's Order No. 536 in accordance with instructions from the Trustee or a person designated by him.

13. That following the closing of the sale and pending the earlier of (i) further order of this Court, (ii) the date on which this Order authorizing the sale shall not have been reversed and no further appeal may be taken by any party or (iii) 90 days after the Closing Date, Soo and SLRCO are directed to conduct the operations of the Railroad, (as defined in the APA), and to maintain the Rail Assets, subject to additions and dispositions in the ordinary course, on a basis reasonably designed to account for the operations of the Railroad and the identification of the Rail Assets subsequent to their transfer to Soo and SLRCO.

14. All requests for relief pertaining to the subject matter of this Order not otherwise granted by this Order shall be considered denied.

15. Directions contained in this Order shall be carried out forthwith.

Dated: Feb. 19, 1985

ENTER

/s/ Thomas R. McMillen
United States District Judge

[1]* UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 77 B 8999

IN THE MATTER OF:

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY,

Debtor.

February 8, 1985–11:00 O'Clock A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE THOMAS R. McMILLEN

APPEARANCES:

MR. ROBERT H. WHEELER
MR. LAWRENCE S. ADELSON
MR. MICHAEL D. SULLIVAN
MR. WILLIAM C. SIPPEL

MR. ALBERT E. JENNER, JR.
MR. DANIEL R. MURRAY

MR. EDMUND J. KENNY
MR. GARY T. JOHNSON

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* Numbers in brackets refer to the court reporter's original pagination of the Transcript of Proceedings.

MR. DAVID D. ROSENSTEIN
MR. MARVIN F. METGE
MR. BYRON OLSEN
MR. MICHAEL COOK
MR. SALVATORE SONTORO
MR. STUART F. GLASSNER
MR. JAMES P. DALEY
MR. CHARLES MILLER
MR. HENRY SAILER
MR. PAUL DUKE COVINGTON
MR. LAWRENCE BEMIS
MR. JAMES S. THIEL
MR. ROBERT S. STEINER
MR. JOHN O'B. CLARKE, JR.
MR. JOHN H. CALDWELL
MR. LARRY MITCHELL
MR. HENRI RUSH

Court Reporter: JAMES W. CHEEK

[2] THE CLERK: 77 B 8999, in the matter of the Chicago, Milwaukee Railroad.

THE COURT: First of all, I would like to compliment the very able presentations that were made by all of the attorneys yesterday and particularly those for the Chicago Milwaukee Corporation and Trustee and, I should add, the North Western Railroad. The reason I mention them specifically is not because I would value or grade their arguments any higher than some of the others but that they made my task more difficult by presenting the arguments that they did.

The problem that I am faced with is probably deeper and somewhat more complicated than I had originally believed when I told the assembled group that I felt the application of the Soo should be adopted and consummated by the Trustee but, as I told you at that time, it was a tentative decision that was certainly subject to reconsideration and that I was going to listen carefully to the arguments of the parties and also read more carefully the briefs and the records. I, of course, had an opportunity to do that but not in the detail that I would have been able to do had I not wanted to expedite this decision. In other words, you will have to forgive me if I don't cite a number of facts and figures completely accurately because I don't want to take up your time by looking back into the record to check them out unless it is something that is important to get down to the exact dollar figure. But I am prepared to give you my findings and conclusions [3] and that is what this proceeding is about, pursuant to Federal Rule 52.

Now, with all of these talented and competent attorneys that have been proceeding with me in this task it is not surprising that questions of an appeal or a stay or disruption of the orderly proceedings of the Court's order would be raised. I would like to say at the outset that I do not think that the possibility of those things occurring should be the basis for a decision. There are enough attorneys here so that we can anticipate there may be some proceedings in higher courts or back with the Interstate Commerce Commission for some time no matter which way the decision goes and what the details of the decision are. I think it would be entirely improper for me to decide this case in favor of one party or the other because of the possibility of an appeal or even the possibility of a stay.

I do differ with Mr. Murray and, I believe, also with the Trustee that the St. Joe Paper Company decision by the Supreme Court, particularly Justice Frankfurter, is one that precludes my considering anything other than the desires of the stockholders of the CMC. I have read the case and, of course, I have read the Interstate Commerce Commission's comments on the case. I go beyond what the Interstate Commerce Commission report has said. In my opinion, the case does not apply to the situation that is before us here. It is a case where a merger was being imposed upon another corporation, contrary to the desires of the stockholders of the [4] corporation without giving any consideration to them, something like a cram-down consolidation, which we are not considering here. This is simply a sale of some of the assets of the debtor. Although I am not sure that St. Joe Paper Company is still good law, as the Interstate Commerce Commission attorneys believe it is not, I will say this much: it probably would depend a great deal on whether you get five persons like Justice Douglas writing the opinion or five persons like Justice Frankfurter writing the opinion. It might be a five-four decision, just like we have had some close decisions in this case.

In any event, I do not think the St. Joe Paper Company case would be reviewed other than to say that it is not applicable to the situation that we have here. So, that is my first conclusion on the law. As a matter of fact, I find it very difficult to separate conclusions on the law from conclusions of fact or inferences of fact or findings of fact. So, sometimes, they are going to be taken out of sequence. That is another thing, if I had time to sit down and write an opinion or to go over proposed findings and conclusions, I might be able to make it a little more orderly but some of the findings and conclusions will be mixed together, both factual and on the law.

While we are on the subject of litigation, I might add that I do not agree with Mr. Murray's argument that the stockholders of the CMC are being deprived of any of their property without due process, in violation of the Fifth Amendment. I am [5] not an authority on constitutional law and I would have to defer to authorities such as Mr. Murray, if he purports to be one, or Mr. Jenner, who wasn't here when Mr. Murray was able to give his presentation. But it seems to me that the stockholders of the Chicago Milwaukee Corporation have received full due process as far as their basic original offer was concerned of $569 million and that, as far as that goes, they are receiving due process as far as the additional $210 million is concerned. But I would like to point out that, in my opinion, that is not property of the CMC. The $210 million is basically a premium or a "windfall" as one of the attorneys termed it, and it is difficult for me to see how a person can be deprived of a windfall or something which is not theirs without due process under the Fifth Amendment. I think, however, that the CMC has received due process unless they are correct that they have the right, or their stockholders do, to veto or have to prevent any transfer except one for the highest and best offer, which is what their $786 million offer consists of.

The fair market value of this property has been determined by the Interstate Commerce Commission as something below what the offer by the Soo Railroad stands at right now. $570 million is the approximate figure that the Soo Railroad is offering. It is well above the fair market value determined by the Interstate Commerce Commission. I find that the determination by the Interstate Commerce Commission is not arbitrary, capricious or an abuse of discretion under Section 706 of the Administrative Procedure [6] Act and that that is the fair market value to which the stockholders of the CMC are entitled and, of course, the Trustee. Over and above that I think it becomes a matter of evaluating just what the significance of the additional $210 million is and how it should be viewed as far as evaluating the offer of the Chicago Milwaukee Corporation vis-a-vis the offer of the Soo Railroad. We will get into that a little bit further as we go along. But, in my humble opinion, the $210 million—it is almost $211 million—is not by any means a controlling factor in which railroads should prevail in this particular contest.

Now, in the question of possible future litigation, which occurs in many cases and can't be overlooked as a possibility in this case, it is my intention to structure the consummation of this acquisition in such a way that the identity of the Milwaukee equipment, real estate, personnel and operation as a unit will be preserved insofar as it is physically possible to do so.

Both of the parties have set up subsidiaries to which this property will be transferred. I am going to ask the Trustee at the time of executing a judgment order on February the 19th to structure the consummation of this acquisition in such a way that if the matter should be overturned by a higher court or if one of the parties defaulted it could be turned back to the other party or to the Trustee. In other words, a disengagement has to be considered under the circumstances because no one knows, actually, how this controversy is actually going to turn out [7] except as far as the end of this particular dissertation is concerned.

I remember a case in which some of you may have been involved some years ago, when I was in private practice. There was a controversy over whether the Continental Illinois National Bank and Trust Company of Chicago, which Mr. Ogilvie, by the way, is now a director but a new director, I might add, could acquire the City National Bank and Trust Company, which was right across the street, and the Comptroller of the Treasury, as I recall, objected to the acquisition. The Court overruled the objections but made it a condition of the acquisition that the books and records of the Continental Bank be kept in such a way that, if the Comptroller of the Treasury was correct, the City National Bank could be reestablished and go back into its original quarters and operate its business as before. That litigation went on for about two years, as I recall, or maybe three. Eventually, of course, the Continental Bank prevailed. But had it not prevailed, the City National Bank and Trust Company would have become an operating entity. It was done by the persons that were responsible for the acquisition and they kept separate books and records. They segregated the assets. They even segregated the customers. They knew which business was City National Bank's busines and which business was not. The same thing, I think, can be done in this case without interrupting the actual acquisition or the flow of not only the property but personnel and material from the Trustee to the acquiring common [8] carrier. So, that would be, I suppose, one of my conclusions of law, but, nevertheless, an order on the Trustee.

Now, another scarecrow that has been erected by some of the parties is the question of the government's obligation—or the Trustee's obligation to the government for the $143 million of notes that are outstanding which the government has made some statements to the effect could be called for immediate payment. That scarecrow also doesn't bother me enough to tilt the scales against the Soo Railroad.

In the first place, the Soo has said that it is going to honor the obligation. It is going to indemnify the Trustee from any litigation that may arise when the government attempts to call the notes. They are really not called but they are terminated, according to the government's theory, terminable. I looked over Appendix I to the Interstate Commerce Commission's report, as Mr. Wheeler suggested, and found nothing to really be concerned about as far as the Soo's ability to negotiate an amicable disposition of those particular obligations. I don't say nothing to be concerned about but it is not going to be something they can do out of their present cash, pay out of their present reserves but, when they need to, they will be able to do whatever the government agrees to.

It would seem to me, however, the government has indicated to the North Western Railroad that it is not going to call these loans, and that is for a very good reason. The reason is the [9] loans were made to rehabilitate the Milwaukee Railroad. As long as the Milwaukee Railroad is in existence, either as a part of another railroad or as a part of a subsidiary of another railroad, the purpose of those loans and the purpose of those notes was to help the Milwaukee Railroad become a viable transportation entity. I think it would be entirely contrary to the intent of Congress in passing the Milwaukee Railroad Restructuring Act and the statutes under which the loans were authorized to then turn around and attempt to force the acquiring carrier to drain off the $143 million which undoubtedly would be needed by either of the railroads, and thereby cause serious problems and possibly, as Governor Ogilvie mentioned yesterday, even cause a miscarriage of the transaction in the event the Soo were the acquiring carrier. I don't believe the government would be justified in doing that. They have indicated clearly to the North Western Railroad that it would not do that. I think it certainly owes the same kind of consideration to the Soo Railroad if the Soo Railroad is the acquiring carrier. What the ultimate disposition of those will be I would not predict because I believe that the matter might be subject to litigation if an agreement is not reached if the Soo is the acquiring carrier. But I have every confidence in believing that the government is going to be reasonable and not going to take steps which will ultimately either destroy the Milwaukee core railroad and possibly with it the Soo Railroad or cause a miscarriage of the transaction if the Soo is the acquiring carrier. So, that [10] particular scarecrow does not cause me sufficient concern to tip the scale against the Soo Railroad.

A third one has been raised—and I am not, again, an expert on the subject—is that for some reason the transaction with the Chicago & North Western Railroad would preserve the tax losses or tax benefits of the CMC and that this may not happen if the Soo is the acquiring railroad. That, to me, I don't understand. I don't think Mr. Murray understands it because he wasn't able to explain it to me yesterday, with all due deference.

I will instruct the Trustee to structure whatever the consummation of this acquisition is in such a way that it will preserve whatever tax benefits the Chicago Milwaukee Corporation can have regardless of who the transferee is. It is beyond my understanding why there should be any different results as far as the tax benefits to the CMC are concerned whether it is the Soo or the Chicago & North Western Railroad. So, that is a third scarecrow that doesn't scare me very much.

Incidentally, I hope I don't sound as though I am an advocate because, obviously, that is not my function in this case. We have had enough advocates already. I am trying to make a decision on the basis of the record and in the exercise of my discretion and, in order to do so, I must make certain findings and conclusions which support my decision. In that respect, of course, my findings and conclusions must be in accordance with the record but they are necessary to support my decision and, [11] therefore, I want you to understand that in doing so I am not taking the position of advocacy except that I want to enter a decision and an appealable order, final order, under Rule 58 that is supported by proper findings and conclusions.

I will make another conclusion of law at this point, since it is generally done at the beginning of the decision rather than at some other point, and that is that we are proceeding under Section 5(b) of the Milwaukee Railroad Restructuring Act and that is the basis of my jurisdiction along with the fact that the Milwaukee Railroad is here pursuant to Section 77(b) of the Bankruptcy Act. I am acting as a bankruptcy judge in that respect. Just what effect or relationship there is between Section 5(b) of the MRRA and Section 77(b) of the Bankruptcy Act is not entirely clear because Section 5(b) is a relatively new section. It is special legislation. Even Mr. Rush could not satisfy me in answering some of the questions about jurisdiction of the ICC under Section 5(b). I have some question in my own mind—and I am not going to try to resolve it at this point—as to just what kind of continuing jurisdiction, for example, there is with the Commission under Section 5(b). But I will, as usual, welcome any exercise of jurisdiction that the Commission might have to the extent that it has the jurisdiction. Those questions may arise some time in the future, also.

I also asked Mr. Wheeler yesterday why we couldn't proceed under Section 4 of the MRRA. He didn't have time to frame [12] his answer. I am sure he has an answer. It looks to me as though on the face of it, Section 4 is equally applicable to Section 5(b). As far as I am concerned, I am also proceeding under Section 4.

Now, I know there is some legislative history that would indicate that Section 4 may not be applicable but I read the statute according to its plain words. What it says is what it means. If there is no ambiguity, if there is no question that requires one to go into the legislative history, then the statute speaks for itself. It seems to me that Section 4, which bypasses the Interstate Commerce Commission, incidentally, does give the Court authority to do what we are doing now, in other words, to approve the sale of assets of the Milwaukee Railroad.

Now, as far as the merits are concerned, I should let you know at the outset that I do agree with the recommendation of the Interstate Commerce Commission that the acquisition should be made by the Soo Railroad. That is not a binding recommendation. I believe we all agree on that. It is a recommendation that I asked for and which I give considerable weight to. It is not binding but because of the expertise of the Interstate Commerce Commission I feel that it is entitled to great weight.

I also asked Trustee Ogilvie for his opinion. I don't criticize him one bit for giving me his opinion. I don't know whether I asked him on the record or not but I value his opinion and I have taken it into consideration. The rest of the persons that spoke yesterday are advocates for their own position. They [13] represent clients. They present the arguments most forcefully for their client's side of the case. It was only at my request, I believe, that Governor Ogilvie departed from his ordinarily impartial or, let's say, concern primarily for the best interest of the estate to take an adversary position. He did it for the best interests of the estate, in his opinion. It just so happens I don't agree with him. We haven't always agreed. In fact, we had a matter in which he took an appeal from an order which I entered and, as I recall, obtained, I think, the only reversal we have had in this case. He asked me before he took the appeal if I would mind. I said, "No. That is your right. We want to know what the law is." It so happens I don't think the Court of Appeals made the right decision but Governor Ogilvie does. That is all water over the dam.

We have had what, 25 appeals in this case? At least.

MR. OGILVIE: More than that.

THE COURT: More than that. Good business for the lawyers. That is why, with all these lawyers sitting around here, I expect we are going to have some more appeals.

But I don't think anybody is going to appeal just because of vindictiveness or try to destroy a valuable piece of our economy, of our transportation system or to try to put the Soo Railroad out of business. I don't believe any of the parties are interested in that. I hope that the CMC will take that into consideration.

I am not going to allow an appeal to frustrate what I [14] consider to be the public interest in this matter. I have already said that. I think that the decision has to rest upon what is in the public interest. That is, in my opinion, not a particularly close question.

I have tried to think about whether or not the additional $210 million that the CMC would get, if the North Western were to acquire this railroad, could be weighed against the public interest. There is no way that I think those two can be compared. The public interest is not something that you can attach a dollar value to. It is a matter of intangibles in many respects. It is a matter of inferences in many respects. It is not something that you can say is worth more than $210 million, which is the excess that the North Western is willing to pay, or less than $210 million. It is my belief that the $200 million is a windfall or a bonus that the CMC would get if the North Western Railroad would be the prevailing party and that it really should not control the decision. Because what, basically, the stockholders of CMC are entitled to is the fair value of the line. When both parties came up with what they believed the fair value was in the time just before the first ICC decision, that in my opinion, is the expression of the North Western Railroad as to its opinion. It offered another $210 million, basically, because it thought it could get some other advantages besides the fair value of the line. It's believe that it would be able to outbid its competitor, which it did dollarwise, and it believed, I think, that it could buy out some of its [15] competition. I think that, probably, the $210 million was partly arrived at because the North Western Railroad believed that it could make that much more money in operating the Milwaukee as part of its system and recoup it for the stockholders of the North Western Railroad than it did when it made the offer which it thought was the fair market value of the Milwaukee lines.

On that subject there has been quite a bit of talk about the $123 million that the North Western Railroad would be able to contribute to the public generally by virtue of consolidations and increased efficiency and general savings by virtue of operating on a large scale but consolidating and so forth, selling the unnecessary Bensenville yards, for example, just one small example. What I think is obvious from the $123 million figure is that someone is not going to be working. A large proportion of the expenses of operating a railroad, something in the vicinity of 70 percent, I believe, Mr. Wilson pointed out, are personnel expenses. If you are going to save $123 million, that means that there is going to be $123 million less for the employees who are not working because of the consolidation. I don't know who they would be. But I can't see that that saving is particularly advantageous to the public. It is advantageous in the sense that it will make the North Western more efficient and more profitable but in the same breath the North Western is going to take $210 million of its assets and pay it to the CMC. So, they are taking $210 million excess money out of the transportation system and giving it to a non-transportation [16] entity, the CMC.

I hope the CMC can use its money, whatever it gets in this case, as advantageously as the predecessor of the Chicago & North Western Railroad did, Mr. Heinemann, when he spun off the railroad and took the benefits of tax deductions. I suppose the stock of the Northwest Industries has increased as much as the stock of the Milwaukee Railroad has in the last few years. I am not talking about the last few years of the Northwest Industries. They have had a little bit of a set back. The point is that the CMC is not a transportation industry and $210 million at the very least is going to be transferred from our transportation system to a non-transportation entity of the North Western were the bidder.

Now, I think that everyone agrees that but for the constitutional problem or the St. Joe Paper problem, which I have already put aside, the basic consideration on valuing these transactions is what is in the best public interest, what is most beneficial to the public. Now, the public is a large amorphous group. I wouldn't eliminate the stockholders of CMC from members of the public. Obviously, they are going to benefit just as they have benefitted up to this time. But the public is a much greater group than that.

The main problem that I see with an acquisition by the Chicago Milwaukee Corporation is the defeat of a substantial amount of competition for it to acquire the Milwaukee assets. I am sure you are all familiar with these maps. I am holding here the one [17] that shows the Milwaukee in orange and the North Western in green. Although you probably all can't see it, as I say, you are probably familiar with it. You can see that most of the lines are in the same general area, Wisconsin, southern Minnesota, particularly Iowa, and it is what the ICC calls a parallel acquisition. That means that to a large extent many of the lines are parallel to each other and therefore subject to deterioration or abandonment or lower efficiency because a corporation doesn't compete with itself as strenuously as it competes with another corporation. You can't expect the Chicago Milwaukee Corporation to compete with its subsidiary.

So, I think it is perfectly reasonable to assume and I find that there will be a large amount of abandonment of the Chicago and North Western trackage if they were to acquire the Milwaukee line.

Take the line from Chicago to Milwaukee as just one example. There are three main lines now, according to this map, running up there. There are two main lines that go up to Minneapolis-St. Paul. As far as from Milwaukee to Wyeville, or some junction there, Wyeville, Wisconsin, the North Western and the Milwaukee are only a few miles apart, relatively few miles apart. There are very few intermediate stops on either of those lines. They are not going to last very long in competition with each other.

The Chicago & North Western Railroad was perfectly [18] frank in saying in the first filing that it made with the Interstate Commerce Commission that it was going to abandon approximately 1100 miles of its line if it acquired the Milwaukee. Now it says it won't abandon the 1100 miles until it goes through the process of the Interstate Commerce Commission. But it hasn't said it isn't going to abandon 1100 miles, and I wouldn't expect it to say it isn't going to abandon 1100 miles. If it can't operate 1100 miles profitably, it is going to come in before the Interstate Commerce Commission and ask for abandonment, and we know, Governor Oglivie and I and Mr. Wheeler, that it is going to get that abandonment.

I wanted to say one other thing about the question of duplication of routes and that is on the transportation system from Minneapolis-St. Paul to Kansas City. Now, I think the Interstate Commerce Commission, in attempting to restore competition in that particular corridor, puts the Chicago & North Western Railroad into something of a "Catch-22" situation. It said that we will approve—they didn't say this—they said one of the conditions we would impose upon any transaction between the Milwaukee and the North Western would be trackage rights for the Soo so it can get down the spine line in favorable conditions. It didn't say "favorable conditions". But, obviously, "trackage rights" means that the Soo would be able to operate profitably from Minneapolis-St. Paul to Kansas City over the Chicago & North Western line. They would have to pay rent, of course. Yet, on the other hand, [19] the trackage rights would be worth nothing unless they were not sufficiently advantageous to the Soo so that it would use them and make money on them. That means that the river route will go by the boards in large part.

The river route has been used by the Milwaukee Railroad to good advantage. It is making money on the river route as far as I know. It is making money period. The river route is the way it carries its traffic from Kansas City to the Twin Cities and back. As a matter of fact, Governor Ogilvie and I took a journey along the river route. It is a beautiful trip. It is too bad they don't have any passenger trains any longer. In any event, the route has been maintained. The Milwaukee has put a considerable amount of money into it. It still needs more money put into it to bring it up to full operating capacity.

What the trackage right agreement would amount to is that there would be no longer competition between the river route and the spine line to amount to anything. It would be local traffic. Even the Chicago, Milwaukee Railroad concedes that. On their map, which they filed some time around the first proceeding, showing what was going to be abandoned, which is attached as one of the exhibits to one of the—I believe it is the Soo Railroad's reply memorandum—they specifically showed a large segment of the river route as subject to abandonment.

It is my finding that there would be a substantial amount of loss of transportation system by abandonment if a parallel [20] acquisition were to be authorized.

Now, on the other hand, the ICC definitely prefers an end to end consolidation. The reason for that is perfectly clear. It does not require abandonments or, at least, a very minimum amount of abandonments and it increases the efficiency of the system. They have an opportunity to run through-trains for a much longer period, much longer distance, much longer time and we would no doubt, find the Soo running trains from someplace in Canada to Kansas City and Louisville, Kentucky by an end-to-end consolidation. That has been a policy of the Interstate Commerce Commission for at least as long as the Tucumcarri decision and probably before that because of its logic. I don't think there is any argument that the system is going to survive in the way in which it becomes consolidated with the Soo and a much more viable transportation entity than it would under a consolidation with the Chicago & North Western Railroad.

You can see that, again, from the other map, which has the Soo property at the top in blue and the Milwaukee property in brown at the bottom. There are very few places where there is any parallel excess trackage. The ICC found that the Soo would not have to abandon any of its trackage in order to operate the Milwaukee property.

Now, what is the matter with abandonment? Well, for one thing it costs jobs. People are going to be out of work that were working on the abandoned transportation system or routes. [21] Another consideration that hasn't been, really, considered very much but was mentioned by one of the Commissioners in the January decision of the ICC and that is the matter of national security.

Governor Ogilvie was in World War II and he was over in Europe. I was over in Europe from a few days after the invasion until some time after the war was finished over there. If any of you have read a recent book by

Robert McDonald called "Day for Trumpets"—I think that is the name of it—I'm not an agent for him but he is a very—"Time for Trumpets"—thorough and knowledgeable writer on World War II. You will see in there his statement as to what value the Germans' railroad system was to their ability to maintain two fronts and the inability of the Allies, who had air superiority almost throughout the war, to interrupt that transportation system just because they had alternative routes. I think it would be almost—well, I would say once a railroad is abandoned, once a piece of trackage is pulled up and the land sold it isn't going to be replaced. It is almost irresponsible under the international situation that we are faced with today to tear up pieces of a railroad system, which is probably the best in the world, for no better reason than a few million dollars difference in the bidding price.

I must say that I think that national security is a very important consideration for keeping an extensive and more viable system of transportation than consolidating it into one rather narrowly restricted area, which is what would happen, [22] comparatively, with the acquisition of the North Western Railroad compared to the Soo Railroad.

On that subject I am also impressed—and I consider these both to be findings—with the fact that the Soo Railroad gives to the midwest and its industries and shippers three gateways to Canada which otherwise would not be available to such places as Kansas City and Louisville, Kentucky. We have a gateway from Chicago but the Soo Railroad supplies three gateways as it is presently constituted. As I look at the map, it wouldn't, probably, be a great investment for it to have another gateway to Canada.

Let's face it. The United States needs foreign trade and needs friends. We are no longer an unsinkable battleship, as they called the British Isles in World War II. If there is going to be another World War, the United States and our cities and our transportation system are going to be targets for the enemy to hit. If we have friends in Canada, we have access to Canada, we have one more way of defending ourselves. But aside from that, because I'm not an alarmist about international affairs, it does promote international trade and we certainly are in need of that. So, that is one factor that really hasn't been mentioned very much by any of the parties except that the state of Minnesota, in answer to my question, said it was not concerned about competition from Canadian grain or Canadian products. I think there is every reason not to be concerned. At least, that grain will be destined for overseas shipments. I visualize that very possibly the Soo [23] will have loading facilities that are more extensive than the Milwaukee has now on the Mississippi River, if the river line stays in existence, which will aid in transshipping grain down through New Orleans to foreign ports.

I think something like 90 percent of all of our exports of corn, wheat and soy beans go out of New Orleans. And, of course, the Soo will have access to the Mississippi River and many places if the river line stays in existence.

I have confidence in the expertise and ability of the Interstate Commerce Commission to solve many of our transportation problems but, as one of the Commissioners said, if you can have a clean transaction that doesn't involve future government intervention or regulation, that is highly preferable to one in which the ICC and the courts are going to be involved for an undetermined period of time. In fact, I think that was Commissioner Gradison who, incidentally, voted against the North Western proposal in the first decision and changed her vote to be in favor of it in the second decision. I don't want to get into the question of analyzing the votes because the majority vote, as far as I am concerned, is the opinion of the Commission. But I think it rather interesting to observe that nobody but Commissioner Gradison even wrote a dissent on the ICC second decision, January decision. She changed her position. So, if anyone had a razor-thin edge decision to make, it seems to me she must have been the one. That is why I called it a double-edged razor decision yesterdy but nobody [24] seemed to think that was very funny. Well, I guess it wasn't.

So, to get back to the function of the Interstate Commerce Commission, what it would do in approving a merger or rather—not a "merger"—an acquisition by the North Western Railroad of the Milwaukee Railroad core would be to destroy competition with one hand and then try to—I mean to destroy it with its left hand and then try to restore it with its right hand. That is why it imposes the three trackage agreement conditions on the transaction and that is why it reserved jurisdiction to decide the trackage problem with the Burlington Northern.

I, frankly, think that the best way to stimulate competition and to guarantee competition is by the free market system that this nation has always lived by. If you can do it by an end to end consolidation with the Soo, in my opinion, that is far preferable than trying to restore competition after you destroy it by giving trackage rights or trying to arrange trackage rights with the acquiring railroad.

On the subject of trackage rights, I don't think they are nearly as well or easily solved as the North Western Railroad would like to have us believe. There are many difficult problems in convincing the dominant owner to allow a competitor to transship over its line with profit. It actually has to give up profit. It has to give up trade. I think this is illustrated by the comments of the RLEA yesterday that they were not satisfied with the arrangement because it hadn't taken care of the question of [25] employee problems or manning problems. There are many problems that I think would probably cause consternation and litigation for a long time were the ICC to attempt to restore the competition that it destroys or would destroy by merging the—or by consolidating the North Western and the Milwaukee.

I am correcting myself on the word "merger" because that is what the St. Joe Paper Company case was all about. This is not a merger, not in the legal sense, anyway.

I was also quite impressed by the chart which Mr. Olsen showed yesterday—and it is an exhibit in the record but I'm not sure it was identified exactly by the number—which shows the difference between the acquisition by the Soo and the acquisition by the North Western. What it really boils down to is that you would have a relatively large railroad in the midwest consisting of the North Western and the Milwaukee, if there are no abandonments, with a railroad almost as small as the present Milwaukee core competing with it or trying to compete with it. That is not the way a viable transportation system or competition is created, in my opinion.

On the other hand, the other column of his exhibit showed that if the Milwaukee core assets were transferred to the Soo, the two lines would be in a relatively equal position economically, carloading, trackage wise and competition wise. I was impressed by that when I read the briefs and when I read the record because it is perfectly obvious that the Soo is going to be in a [26] very difficult competitive position if the North Western and the Milwaukee are combined against it. On the other hand, it will be in a position where it can compete and where it will constitute a viable portion of our transportation system if the Milwaukee and the Soo are combined. You can consider that one of my findings.

I believe that I have the opportunity and jurisdiction to draw inferences and conclusions from the record and from the facts that are known to the parties and not really disputed, which the Interstate Commerce Commission was not always willing to do. That is true with respect to the question of abandonment. I am basing it on my common sense and my reasoning as best I can do. As Mr. Murray agrees yesterday, this is really a matter of exercising the court's discretion, at least if you set aside the constitutional and the St. Joe Paper veto power that the CMC thinks it has.

I will say, frankly, that I think a consolidation with the North Western would not be contrary to the public interest. I believe that it is not nearly as promotive of the public interest as one with the Soo Railroad would be.

Another consideration that I have taken into effect, and I mentioned it briefly, was the job protection offered by the Soo Railroad for persons who are now working with the Milwaukee compared to the persons that are now working and would be laid off were the North Western the successful bidder. The figures are almost three to one in favor of the Soo Railroad as far as the [27] number of employees are concerned who will lose their positions because of the consolidation. I think 780, perhaps some figure right around in there. Then, as I mentioned before, the $123 million saving which the North Western has projected would come largely out of employment costs, in my opinion, and I so find.

On the question of rates, again, the Commission refused to speculate. I believe that it is reasonably apparent that a monopolist is going to exact higher rates than would be available in the competitive free economic system. I don't think there is anything mysterious about that. But what is there to keep the North Western Railroad from increasing its rates up to the point where the shippers can pay them, if it can do so, except competition? I don't find what would be the restraint.

I do not believe that the farmers in Minnesota and Wisconsin are going to get any different price for their grain which is shipped out of the area whether the railroad charges them one rate or another. What is going to happen is, if the rates go up, the farmers are going to make less profit or lose more money on their crops.

I am not in a position to say that the rates one place or another are going to increase. All I can say is that competition, in my opinion, is the best way to keep rates as low as reasonable. No railroad is going to transport goods at a loss but they are also not going to forego making a profit if they can do so without losing business. [28] One other factor that I think I should mention, and it really hasn't been brought out particularly, is that on abandonment the public cost is immeasurable from the standpoint of the maintenance of the alternative modes of transportation. If a railroad line is abandoned—and this has happened all though the midwest, as those maps which Mr. Olsen or, I guess, you presented yesterday—have indicated that that traffic is going on to the highways mostly. There are a few canals, a few rivers but mostly it goes on to the highways. The cost of maintaining the highways is something we can't speculate about.

All we know is the more traffic that goes over the highways the more maintenance they require and the more the public and the shippers require of new highways to be built. Now, the federal government is trying to get out of the highway business as fast as it can, just like it is trying to get out of the regulation business. But someone is going to have to pay the cost. I think it is one that hasn't been considered and should be in considering whether or not we should have an end-to-end merger or a parallel merger—acquisition.

I am impressed particularly by the fact that every state in which these railroads operate has come in and opposed the acquisition by the North Western Railroad. There are many reasons for that. I think primarily their reason is to protect their shippers and to protect their farmers, who are shippers, and to keep the free competitive system in operation rather than a [29] monoply. There may be other reasons; I am sure there are. But that is a factor. I think it is one that is entitled to considerable weight.

These states are not acting in concert. They are acting in the interest of their own citizens. They are not acting for citizens outside of the states. Unanimously they oppose the acquisition by the North Western Railroad.

The same thing, I believe, is true with respect to the employees. I haven't received as many letters as Mrs. Leatherman and probably not as many as the Trustee but no one has told me that they received a letter from any employee asking that the merger—that the acquisition be comsummated with the North Western Railroad. All of the letters oppose the acquisition by the North Western Railroad. This is somewhat of a surprise but, nevertheless I think it is significant. The employees, for some reason or another, simply do not wish to become a part of the North Western system.

Now, Governor Ogilvie knows and I know and I think most everybody else here knows that the reason the Milwaukee Railroad had been able to pull itself up to a place where it is making eight and a half or nine million dollars a year is in very significant part because of the cooperation of the employees. The employees have made some sacrifices but, more importantly, they have put their shoulders to the wheel and determined to make the Milwaukee Railroad work.

[30] Governor Ogilvie told me about one employee who, when he heard about the company having its difficulties, just after the petition was filed, maybe a year or so after, put a mortgage for something like $40,000 on his house and bought Milwaukee stock when it was around $17 or $20, someplace around in there, because he said, "I spent most of my life with the Milwaukee and I want to see it succeed." Incidentally, he also succeeded financially quite well. He did sell, however, way below the top, according to Governor Ogilvie. I think, perhaps, one reason that the Milwaukee employees are a little hostile toward the North Western Railroad is because they consider it to be owned by those employees and they would have no ownership in it. I have never actually heard any employee say that but I think it might be one factor. It is not particularly significant but the employees do control 30 percent of the railroad. They probably are the largest single stockholder, aren't they? Anyway, they are large. Maybe the Milwaukee employees are a little bit reluctant to get into that kind of a situation. It isn't, I don't think, entirely because they have been competitors. Because they have competed with the Soo Railroad to a certain extent. I spent a lot of my time in northern Wisconsin. I have seen the fact that these two railroads, the Soo and the North Western, are not that far apart. I am sure a lot of the employees know each other and live in the same town. For some reason or other the employees almost unanimously, if I am not mistaken, will give better service and make more sacrifices [31] in order to make the Soo-Milwaukee combination work than they would if the North Western-Milwaukee combination were to work.

I believe I have covered enough of the findings of fact to support the exercise of my discretion in favor of the Soo Railroad. I don't think it is, in my opinion, a particularly close comparison if you apply the policy of the

Staggers Act, which is about the most recent expression by Congress of its transportation policy—and I am sure you are all familiar with it—and also the policy of the present administration with which most of us agree that the government and governmental regulatory agencies should stay out of the business of trying to operate railroads or control our economy as far as the transportation system is concerned.

I do not look for Mr. Rush to be out of a job in four or five years. But there is no question but that Congress would like to see less interference with the transportation system, not only the truck lines but the railroads, than would occur if the North Western Railroad acquired the Milwaukee assets.

There are a few rulings that I would like to make. I am going to ask the Trustee's attorney to draw up a proposed judgment order so it can be seen by the parties and then objected to, if they wish to, on February the 19th. One is the question of labor protection so-called. I have looked over the recommendation of the Interstate Commerce Commission. I can't say it is arbitrary or capricious but, on the other hand, I think it is advisory. In my opinion, the procedure that has been used by the Trustee in [32] other abandonments, particularly Appendix B to Order 406, or the master's recommendation, is the preferred one in this case. Mr. Wheeler pointed out the reasons for that yesterday. I think they are sound reasons. I also find that they are equally protective of labor's interest as required by Section 11343 of the Interstate Commerce Act.

I understand that the 16 percent difference in the recouping wages between the Soo and North Western offers is something that is up to the Trustee to negotiate or resolve, according to what Mr. Olsen said, that was imposed. And I take it, because of the fact that there is less money to reimburse the employees the 16 percent, that is not in the Soo plan. I will approve the Soo plan to that extent. But I will ask the Trustee, if there are sufficient funds, that the 16 percent should also be repaid.

It is my finding that the MTT is not subject to the Interstate Commerce requirements and not subject to labor protection requirements, Section 11343, and has no reason to be considered as far as this transaction is concerned. It will be transferred, of course, but not subject to the other provisions that the labor protection plans would impose.

As far as the Seaboard petition is concerned, the Trustee is, of course, only going to convey what rights in interest he has in whatever lines are conveyed. I think that that matter will have to be resolved by the acquiring carrier, the Soo. I am [33] not going to enter any kind of an order prohibiting the Trustee from transferring its trackage rights. If the Seaboard believes they are not transferable, they will have to litigate that or make some kind of an arrangement with the Soo.

I do not believe that I have any other specific rulings to make but, if there are some that the Trustee, upon further reflection, finds that should be made in the order of February the 19th, I will certainly consider them.

I am specifically not making any ruling on the Escanaba & Lake Superior matter because I feel that is going to be worked out but, if it isn't worked out, of course, under the circumstances, I don't believe the Trustee can transfer that particular segment until it is resolved. I am not entering a temporary restraining order on it, though, and I do not have any preliminary injunction motion.

So, I would like to ask the Trustee to draw up a judgment order pursuant to Rule 58 and serve it on the parties not later than a week from today so that they will have a chance to examine it and make any oral objections they have, not on the merits but on the form. Nor is it necessary in that order to do anything other than incorporate the findings and conclusions that I have made orally here today under Rule 52. However, if upon reflection the Trustee finds that I have overlooked some findings or that I have overlooked some rulings, they should be incorporated in the judgment order. That will become a final appealable judgment order.

[34] Then I am going to ask the Trustee to proceed to consummate the transaction as quickly as possible.

I was considering whether there should be an escrow in this case and I don't believe that that is necessary. In an ordinary real estate transaction there is an escrow, of course, and then the money is paid out when the deeds are conveyed or delivered. The Soo says it is ready, willing and able to consummate the transaction tomorrow. The Trustee says it would take approximately a month to actually get the documents in proper order. It does not all have to be done on the same day. It should be done promptly. So, the Trustee should start to work and get the documents ready and the Soo Railroad should get its money ready. It is going to be a cash transaction in most instances.

I have been asked to reserve jurisdiction and also to reserve jurisdiction for the Interstate Commerce Commission. I don't know that I can do that. I will certainly refer matters to the Interstate Commerce Commission if they come up because they have been very helpful and very cooperative in this whole matter. I will reserve jurisdiction to see that the transaction is consummated as far as Section 5(b) is concerned and, of course, I will reserve jurisdiction to consummate a 77(b) plan, if there is any left. I don't believe there is very much to do on that.

If controversies arise in the consummation of the agreement or the transfer of the assets, I believe that I am probably the place that the parties will have to come for their resolution [35] but I do not propose to resolve such things as trackage rights. According to the Interstate Commerce Commission, this should be a clean transaction, a cash deal with no complications. So, I don't expect to be involved. But I will make sure that the agreement and the transaction is consummated.

If there is a default, for example, as I pointed out before, the transaction should be structured in such a way that it can be reversed, can be untangled and go back to square-one or maybe the North Western Railroad. I don't believe that is a particularly difficult accounting problem. As I visualize it, not being an expert in any sense of the word, the Milwaukee lines would probably be operated pretty much the way they are now except for through-traffic and equipment during this transition period. However, that is something I am sure the parties can work out. The main point is that I am not going to reserve jurisdiction except to make sure that the transaction is consummated according to the representations that have been made and that the 77(b) proceeding is concluded. If there seems to be some reason to reserve jurisdiction beyond that, we will cross that bridge when we get to it. But I know that, if there is a breach of contract, the parties will be back in here and I, of course, will be available for that.

Just one other thought. I know you have been patient in listening unilaterally for a change. The Soo Railroad is coming out of this controversy in much better shape than the North Western Railroad.

[36] Actually, if I had ruled in favor of the North Western Railroad, the Soo may have been able to get almost everything that it really wanted without having to pay any money for it. It is a rather peculiar twist to the case which was caused by the conditions which the

Interstate Commerce Commission imposed in order to try to restore competition. I have discussed this with the Trustee before and that is that transaction doesn't have to all go to one party. It has still not gone to the point where it can't be resolved if the parties can get what they want and what they need in order to satisfy their requirements, compensate the CMC, the stockholder, for a fair value and preserve a viable transportation system in the midwest. I am not at all sure that the matter can be resolved amicably but I think there is a possibility of it. I would like to have that explored. Although, I have no other suggestion than that the Soo, as it sits here now, has become obligated to pay $570 million for something that it could largely have gotten for nothing.

Thank you for your attention. We will recess until 3:00 o'clock on February 19th.

MR. WHEELER: Your Honor, if I might. One question. In your prior comments, I believe, last Monday you indicated that while you anticipated the written order being entered on February 19th you had also anticipated a period for motions for reconsideration. Is that something that your Honor anticipates coming prior to the 19th or does the Court even wish to entertain those?

[37] THE COURT: I do not believe there is very much to be gained by motions for reconsideration but, if there are any, they should be filed within ten days of today. Once a judgment is entered, of course, the parties can still file motions for reconsideration but it is my desire and I think it is the desire of almost everyone that this matter be concluded without further briefing or further litigation.

MR. WHEELER: Your Honor, it was with that thought in mind that I wanted to raise the question.

MR. METGE: If your Honor please, Marvin Metge for the Soo Line.

As I understand it, under Rule 52 there is ten days to make filings after the entry of the judgment order for requests to amend or correct the findings and conclusions. I assume that is what your Honor had in mind.

THE COURT: Ten days from today on the findings and conclusions.

MR. METGE: Well, Rule 52 provides for entry of the judgment order and ten days thereafter for parties, by rule, to make suggestions or file motions to amend findings or to add additional findings.

THE COURT: Well, that is assuming that the findings are made in the Rule 58 judgment.

What I am going to do—I have already made the findings and conclusions today, at least to the extent that I can. [38] If the Trustee doesn't think I have made enough, he can so advise me in his proposed judgment order. But I would say that objection to those ought to be filed in 10 days.

Now, a Rule 58 judgment still has a ten-day period in which the parties can file objections, if they wish.

MR. METGE: As I understand the procedure—I have Rule 52, which provides—a copy of it—which provides—

THE COURT: I have got it up here.

MR. METGE: —for entry of judgment and then ten days thereafter in which to make a motion to amend the findings that were incorporated into the judgment or to have additional findings incorporated into the judgment. The structure is, fundamentally, to have the judgment be the trigger for having requests by the parties to amend or to add additional findings.

THE COURT: They can do it after ten days from February the 19th also, but, if you notice, the ten-day provision appears in Rule 52. That is what I was thinking about when I was saying that objections to findings and conclusions should be made within ten days of today.

MR. METGE: The only thing I am pointing out, so that there is no confusion later, is that under Rule 52 it is: (Reading)

> ". . . upon motion of a party made not later than 10 days after entry of judgment."

So, that would be ten days after the judgment order [39] entered under 58, which incorporates your findings and conclusions under the clear meaning of Rule 52 and 58.

I am not trying to argue with the Court. I just want to get it straight.

THE COURT: You are probably the last person in the world that is going to file them, Mr. Metge.

MR. WHEELER: Thank you, your Honor.

(Which were all the proceedings had on said date.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ James W. Cheek	2-11-85
Court Reporter	Date

No. 86-1234 ②

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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31pp

QUESTION PRESENTED

Whether, in these bankruptcy proceedings, the court of appeals correctly declined petitioners' request to vacate the district court's finding that the compensation paid to petitioners by private parties for certain rail assets was constitutionally adequate, so as to enable petitioners to seek additional compensation in a suit against the United States under the Tucker Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1234

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 799 F.2d 317. The order of the district court (Pet. App. 41-51) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1986, and a petition for rehearing was denied on October 20, 1986 (Pet. App. 39-40). The petition for a writ of certiorari was filed on January 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1977, petitioner Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) filed a petition in bankruptcy in the United States

District Court for the Northern District of Illinois, pursuant to Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. (1976 ed.) 205.[1] Thereafter, in 1979, Congress enacted the Milwaukee Railroad Restructuring Act (MRRA),[2] which was intended to facilitate the reorganization of the Milwaukee Road.

Section 5(b)(1) of the MRRA empowered the bankruptcy court, independently of any plan of reorganization, to authorize the sale of lines of the Milwaukee Road to be used in continued rail operations. See 45 U.S.C. 904(b)(1). Such a sale could be authorized only if an "appropriate application" for the sale had been filed with and approved by the Interstate Commerce Commission. 45 U.S.C. 904(b)(2). The Commission in the instant case construed the latter provision to incorporate the requirements of the Interstate Commerce Act that govern similar applications. The Commission accordingly concluded that an "appropriate application" under Section 5(b)(1) of the MRRA is subject to Section 5 of the Interstate Commerce Act, 49 U.S.C. 11343, which governs the Commission's approval of the purchase of the property of one carrier by a second carrier. See *Chicago, M. St.P. & Pac. R.R. Reorganization,* Fin. Dkt. No. 28,640 (ICC Sept. 26, 1984), slip op. 44-45, 90 n.111 [hereinafter *ICC Decision I*]; accord, *Midwestern Rail Properties, Inc.—Purchase—Rock Island,* 366 I.C.C. 915, 921 (1983).

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[1] These bankruptcy proceedings were instituted prior to the effective date of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Accordingly, by virtue of Section 403(a) of that Act (92 Stat. 2683), the proceedings continue to be governed by Section 77 of the 1898 Act and the former Bankruptcy Rules. See *In re Chicago, M., St. P. & Pac. R.R.*, 701 F.2d 604, 605 n.1 (7th Cir.), cert. dismissed, 463 U.S. 1233 (1983).

[2] Pub. L. No. 96-101, 93 Stat. 736, codified at 45 U.S.C. 901 *et seq.*

Under Section 5 of the Interstate Commerce Act, the Commission must consider whether the terms of the transaction are just and reasonable to the shareholders. See *Schwabacher* v. *United States*, 334 U.S. 182, 198-199 (1948); *Southern Pac. Transp. Co.* v. *ICC*, 736 F.2d 708, 725-726 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). This standard in turn is equivalent to the "fair and equitable" treatment of shareholders required by Section 77(e) of the Bankruptcy Act of 1898. *New Haven Inclusion Cases*, 399 U.S. 392, 424-425 (1970). The Commission concluded in this case that both of these standards required that the estate be paid the fair market value of the assets. *ICC Decision I*, at 90.

2. After several years of operating under the protection of Section 77 of the Bankruptcy Act of 1898, the Milwaukee Road received offers from three railroads to purchase its remaining rail operations. The three were the Soo Line Railroad (the Soo), the Chicago and North Western Transportation Company (CNW), and the Grand Trunk Corporation (GTC). Both the Soo and CNW offered approximately $150 million for the lines, in addition to an assumption of approximately $420 million in liabilities; GTC offered substantially less. As required by Section 5(b) of the MRRA, the three bids were submitted to the Commission. Petitioner Chicago Milwaukee Corporation (CMC), the entity that was to emerge with the Milwaukee Road's non-rail assets, objected that the $150 million offered by the Soo and CNW was insufficient and that the net value of the rail assets was $360 million. Pet. App. 3-4.

In a decision dated September 26, 1984, the Commission held that the Soo and CNW proposals both provided "fair compensation" for the Milwaukee Road's rail assets, but that the GTC proposal offered "inadequate compensation" (*ICC Decision I*, at 54-55; see also *id.* at 90). Specifically, the Commission found that the $150 million (plus assumption of liabilities) offered by the Soo and CNW was "fair and equitable" under the standards incorporated into Section 5 of the MRRA from Section 5 of the Interstate Commerce Act and Section 77 of the Bankrupcty Act. In the Commission's view, this conclusion was especially evident under the price/earnings method of evaluation, which the Commission regarded as the most reliable. Applying that methodology, the Commission found that when compared to the Milwaukee Road's net earnings of $8.9 million in 1983 and its projected net earnings of $18.7 million in 1984, the $150 million yielded price/earnings ratios of 16.9 and 8 for the two years. At the same time, the Commission rejected as too high petitioner CMC's proposed net value for the rail assets of $360 million. The Commission explained that CMC's valuation was based on the discounted present value of a projected stream of future earnings, which the Commission determined "is not a particularly reliable methodology since it involves speculation about the amount of future earnings" (*ICC Decision I,* at 54). The Commission further explained that CMC's proposed value would yield a price/earnings ratio of 40 based on 1983 earnings and 19.3 based on projected 1984 earnings, which far exceeded the price/earnings ratios for other railroads (as reflected in sales of their stock) and which the Commission regarded as unrealistic. *Id.* at 54-55, 90; *id.* App. I, at 19-23; see Pet. App. 4.[3]

The Commission also evaluated the applications with respect to factors other than the adequacy of compensation. In particular, the Commission found that the CNW proposal would have "a significant adverse competitive effect on rail transportation in [three rail] corridors," which, the Commission held, would have to be ameliorated by certain conditions on the acquisition if the CNW proposal were to be approved (*ICC Decision I*, at 61-63, 70). The Commission found no comparable anticompetitive problems with the Soo proposal (*id.* at 63-64, 69). Based on these and other factors, the Commission concluded that the Soo's proposal has "important public interest benefits" and is "preferable to that of CNW" (*id.* at 5-6). The Commission therefore approved the Soo proposal. A majority of the Commission did not reach a definitive decision regarding the CNW proposal, and the Commission therefore neither approved nor disapproved it. *Id.* at 2, 5-6, 94-95.

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[3] The Commission also found that CMC's projection that the Milwaukee Road would earn $18.7 million in 1984 was "overly optimistic" (*ICC Decision I,* at 54).

3. After the Commission's decision was issued and the matter was referred to the district court, CNW increased its offer by $210 million (Pet. App. 4). CNW's revised proposal was then referred back to the Commission. In a decision dated January 11, 1985, the Commission approved CNW's offer, subject to certain conditions to ameliorate anticompetitive impacts. *Chicago, M., St.P. & Pac. R.R.—Reorganization—Acquisition by Grand Trunk Corp.*, Fin. Dkt. No. 28,640 (ICC Jan. 11, 1985), slip op. 21-22, 29-30, 34-36 [hereinafter *ICC Decision II*].

The Commission also expressed the view in its January 11 decision that the Soo's bid, while less than CNW's revised bid, remained fair and constitutionally adequate (*ICC Decision II*, at 14-15). The Commission acknowledged that an arms length agreement between a willing buyer and willing seller is one benchmark in determining the issue of fair and equitable consideration. But it concluded that in this context the amount that the highest bidder is willing to pay does not necessarily establish a constitutional entitlement on the part of the stockholders, because "those who invest their capital in a railroad enterprise assume[] the risk that in any reorganization the interest of the public will be considered as well as the investors" (*id.* at 14, citing *Reconstruction Finance Corp.* v.

Denver & R.G.W.R.R., 328 U.S. 495, 536 (1946)). The Commission observed that this Court and the Commission itself have regarded the constitutional adequacy of consideration in circumstances such as these to turn primarily on the past, present, and prospective earning capacity of the railroad. Viewed from this perspective, the Commission continued to find the Soo's offer to be fair, because (i) it provided for a reasonable price/earnings ratio, and (ii) it exceeded the net liquidation value of the Milwaukee Road's rail assets by more than $220 million. *ICC Decision II*, at 14-15.

At the request of the district court, the Commission also expressed its view of the relative merits of the two proposals. By a 4-3 vote, the Commission concluded, on the basis of its "review of the entire record," that "the benefits offered by the Soo proposal outweigh those of the CNW" and that the Soo's proposal was preferable to CNW's modified proposal (*ICC Decision II*, at 2, 31). The Commission explained that the increased compensation offered by the CNW did not reflect any changed circumstances affecting the intrinsic value of the Milwaukee Road's rail assets, but only a change in CNW's business judgment regarding the value of those assets to CNW's own system. The Commission also explained that the Soo's proposal was less likely to result in downgrading and abandonment of lines. However, the Commission's "greatest concern" was with the anticompetitive effects of CNW's proposal in "several critical areas"; those effects, the Commission stressed, would require ameliorative conditions to the acquisition, while the Soo's acquisition would serve the public interest without such conditions. See *id.* at 31-33; Pet. App. 5, 62.

4. The district court, after considering the two offers and the Commission's recommendations, approved the sale of the Milwaukee Road's rail properties to the Soo.[4]

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[4] The district court made clear that the Commission's statement of a preference for the Soo's proposal was only a non-binding recom-

a. In its oral findings delivered on February 8, 1985 (Pet. App. 52-83), the court recognized that "the stockholders of [petitioner] CMC are entitled to * * * the fair value of the line" (*id.* at 63). But the court credited what it understood to be the Commission's finding that the "fair market value" of the property was "something below" the Soo's total offer of $570 million (*id.* at 56). The court also expressed the view that the Soo and CNW both had arrived at what they believed was the fair market value of the property when they submitted their offers prior to the Commission's first decision, and that CNW thereafter had offered an additional $210 million only "because it thought it could get some other advantages besides the fair value of the line," such as "buy[ing] out some of its competition" (*id.* at 63-64). Finally, the court, like the Commission, found the "main problem" presented by CNW's acquisition of the rail lines to be that it "[would] defeat * * * a substantial amount of competition" (*id.* at 65; see generally *id.* at 65-67). Although the court believed that these anticompetitive effects could be reduced by the imposition of trackage rights and other conditions for the benefit of competitors, it concluded that competition would best be promoted by an end-to-end acquisition of the Milwaukee Road's lines by the Soo, which could then compete with CNW without regulatory restrictions (*id.* at 70-75).[5]

b. Immediately after the district court delivered its oral findings on February 8, 1985, CNW informed the trustee by hand-delivered letter that CNW's offer was withdrawn (R. 79). See 2/19/85 Tr. 82-83. Petitioners

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mendation solicited by the court (Pet. App. 62). In a submission filed with the district court on January 21, 1985, the United States supported CNW's application and opposed that of the Soo.

[5] The court also determined that acquisition by CNW would lead to substantial abandonment of the Milwaukee Road lines that were parallel to those of CNW (Pet. App. 66-70).

took the position that this withdrawal was invalid because CNW's offer was to be binding "until rejected by the reorganization court" (R. 44), which, in petitioners' view, could not occur until the court entered a final written order. 2/19/85 Tr. 83-84. Petitioners therefore filed a petition for a writ of mandamus or prohibition in the court of appeals, seeking to bar consummation of the sale and CNW's withdrawal of its offer. By order dated February 19, 1985, the court of appeals denied that relief, finding no "clear cut abuses of discretion or usurpation of power necessary for [its] use of the extraordinary remedy sought" (2/19/85 Tr. 84; R. 105). However, the court of appeals emphasized that its order was without prejudice to the right of any party to seek other relief, including a stay (*ibid.*).

c. The district court entered its written order later in the day on February 19, 1985 (Pet. App. 41-51). In paragraph 4 of the section of the order setting forth the court's findings and conclusions, the court stated that after considering the parties' objections, it approved the Commission's findings and decisions because, inter alia, they were not "contrary to constitutional rights" (*id.* at 43). In the subsequent section of the order that contained the district court's actual decree, the court approved the sale of the Milwaukee Road lines to the Soo and directed the trustee to consummate the sale (*id.* at 46-51).

d. Bankruptcy Rule 8-703(a)(6) (11 U.S.C. App. (1976 ed.) at 1412) provides that "[u]nless an order approving a sale of property * * * is stayed pending appeal, the sale to a good faith purchaser * * * shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal." By virtue of this rule, in the absence of a stay, the sale to the Soo could not have been affected by any appeal taken by petitioners. See Pet. App. 23-26. Nevertheless, although several other parties unsuccessfully moved in the court of appeals for a stay of the district court's order on other grounds, petitioners did not seek such a stay in the court of appeals or in this Court pending appeal on the question of the adequacy of the compensation.[6] The sale to the Soo was then closed on February 20, 1985. Pet. App. 8.

5. Although they failed to pursue a stay, petitioners took an appeal to the court of appeals. They expressly did not urge that court to reverse the district court's decree approving the sale of the Milwaukee Road's rail properties to the Soo. See 85-1683 C.A. Appellant's Br. 2, 5. They also expressly did not challenge the district court's finding that the public interest favored the acquisition of the Milwaukee Road's core assets by the Soo, rather than CNW. *Id.* at 5. Petitioners sought only to have the court of appeals vacate the district court's finding that the consideration paid by the Soo was fair and constitutionally adequate. *Id.* at 5-6, 21-22, 27, 30. Petitioners' stated purpose in seeking vacation of that finding was to put themselves in a position to file an action against the United States in the Claims Court under the Tucker Act, 28 U.S.C. 1491(a)(1), claiming that the district court's approval of the sale to someone other than the highest bidder resulted in a "taking" of their property by the United States to the extent of the difference between the two offers. 85-1683 C.A. Appellant's Br. 2, 32. Petitioners acknowledged that because of the district court's finding that the compensation they received was constitutionally adequate, they would be collaterally estopped, absent a reversal or vacation of that finding, from relitigating the constitutional issue in the Claims Court. At no previous time in these proceedings—either before the Interstate Commerce Commission or the district court—did

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[6] Petitioners did seek a stay from the district court, but that request was denied (2/19/85 Tr. 96).

petitioners argue that the United States might be liable in a Tucker Act suit for compensation in addition to that paid by the Soo.

The court of appeals unanimously denied petitioners' request to vacate the district court's finding that the compensation petitioners received was constitutionally adequate (Pet. App. 3-21). The court first declined petitioners' suggestion that it vacate that finding without deciding whether there had actually been a "taking" by the United States, in order to permit petitioners to present their taking argument to the Claims Court. The court explained (*id.* at 12):

> [T]he valuation was fully litigated before the ICC, which issued mountainous valuation studies and two full opinions, and the district court. The parties invested their all; with $210 million on the table, no one held back. The parties are entitled to the benefit of the judgment for which they fought, not least because the transaction would not have occurred if the district court had found the Soo's bid insufficient. The disputed finding was an essential ingredient of the transaction; had the district court made a different finding, the CNW would own the rail assets and there would be no claim of taking. The reliance interests of the parties—including the United States, which through the ICC could have blocked the deal if it thought the decision exposed the Treasury to a $210 million award—are substantial.

The court of appeals also declined to vacate the district court's finding on the merits, holding that even if the district court's ruling regarding the adequacy of the compensation was erroneous, that ruling would not give rise to a claim for compensation against the United States (Pet. App. 16-20). The court said, "a judicial error in the implementation of a program is not a taking, if a correct implementation of the program would not be a taking" (*id.* at 18). The court found this conclusion to be supported by the general rule that accidental and unintended injuries inflicted by governmental actors are treated as torts, not takings, and that torts are compensable only to the extent permitted by the Federal Tort Claims Act (*id.* at 16-18). So, too, the court reasoned (*id.* at 18-19):

> The government is not absolutely liable for mistaken implementation of a law that does not otherwise take property. Were it otherwise, the Treasury would guarantee the accuracy of all administrative and judicial decisions. That was certainly not the understanding in 1791, when the Takings Clause was added to the Constitution; to the contrary, there was consensus that the sovereign could not be sued for errors save with its consent.

Applying these principles to this case, the court of appeals held that the MRRA "neither requires nor authorizes a judge to transfer property for compensation that is less than the constitutional minimum," and it therefore "makes adequate compensation a condition of any sale" (Pet. App. 20).[7] Here, both the Commission and the district court found that the Soo's application provided for the payment of fair market value. If the district court was correct in this ruling, there could be no taking of petitioners' property. In the court's view, it followed that "a judicial error in answering [this] constitutionally appropriate question does not subject the United States to a claim of taking" (*ibid.*).

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[7] The court concluded that the MRRA "is thus unlike the statute at issue in the *Regional Rail Reorganization Act Cases,* [419 U.S. 102 (1974),] which not only required a transfer without a prior finding of adequate value, see 419 U.S. at 155, but also could have caused a taking by the erosion of value during the judicial proceedings, *id.* at 122-25" (Pet. App. 20).

ARGUMENT

The adequacy of the consideration petitioners received for the Milwaukee Road's rail assets was fully litigated before the Interstate Commerce Commission and the district court. The district court's finding that the compensation satisfied constitutional requirements was an essential ingredient of its decision to approve the sale to the Soo, because the MRRA did not authorize the court to approve the sale for consideration that was not constitutionally adequate. The court of appeals correctly declined to vacate that finding in order to enable petitioners, who enjoy the benefit of the sale to the Soo, to relitigate the compensation question in the form of a taking claim against the United States based on the alleged error of the district court in making the finding on which the sale was predicated. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals, and it arose in unique circumstances and under statutory provisions that are now effectively obsolete. Further review by this Court is not warranted.

1. a. Petitioners concede (Pet. 4, 7, 10, 11, 12) that the district court, like the Commission, found that the consideration paid by the Soo for the Milwaukee Road's rail assets satisfied constitutional requirements. Petitioners do not ask this Court to reverse that finding on the merits. Rather, petitioners urge this Court to *vacate* the district court's finding—while leaving the rest of its decree standing—so that they can relitigate the just compensation issue in a separate action against the United States in the Claims Court, in which they will claim that the court-ordered and now unrescindable sale to the Soo took their property because the valuation finding was erroneous. There is no basis for such a collateral attack on the orderly administrative and judicial procedures that Congress fashioned in Section 5 of the MRRA. Petitioners had a statutory right, under the MRRA, not to have their prop-

erty transferred except for constitutionally adequate consideration as determined in advance by a court, subject to appellate review in the prescribed manner. They do *not* have any entitlement to compensation from the United States on the ground that the constitutionally adequate process reached the wrong result.

If the district court's valuation finding had been appealed on the merits and reversed, the logical course would have been to bar the sale to the Soo on the ground that the compensation was inadequate—not to award petitioners additional amounts from the United States Treasury. The reason why the logical course was unavailable here was Bankruptcy Rule 8-703(a)(6) (11 U.S.C. App. (1976 ed.) at 1412), which provided that once the sale to the Soo had been consummated reversal of the decree would not undo it, together with petitioners' failure to seek and obtain a stay pending appeal.[8] The fact is that after denial of their petition for mandamus, petitioners had no interest in *reversing* the valuation finding and blocking the sale to the Soo: CNW had withdrawn its higher offer, and petitioners therefore could not anticipate receiving greater compensation from CNW or any other private party even if the sale to the Soo were set aside. Instead, after the CNW option was eliminated by the voluntary actions of CNW and petitioners themselves, petitioners' evident strategy was to split the baby and take both halves—both to obtain the benefits of the Soo sale and to obtain from the United States in a separate action under the Tucker Act the $210 million that they failed to obtain from CNW. Petitioners are not entitled both to forgo an appeal (and accept the benefits) of the decree, and yet at the same time have the court of appeals vacate a finding that was an "essential ingredient" of that decree and the transaction it approved (Pet. App. 12). See *FPC* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 502 (1955) (a plaintiff "cannot * * * be allowed to attack an officially approved condition of the merger while retaining at the same time all of the benefits"); cf. *Mississippi Univ. for Women* v. *Hogan,* 458 U.S. 718, 723 n.7 (1982); *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956). For this reason alone, the court of appeals correctly rejected petitioners' attempt to open the way for a "taking" claim against the United States.

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[8] There can be no claim of a "taking" by the United States when a person's alleged property interests are lost as a result of his own failure to follow established procedures. *United States* v. *Locke,* 471 U.S. 84, 107-108 (1985). It is entirely possible that such relief pendente lite would have been granted here if petitioners had advanced in stay proceedings the claim of irreparable constitutional deprivation that they now wish to present to the Claims Court. Compare *Railway Labor Executives' Ass'n* v. *Gibbons,* 448 U.S. 909 (1980); *Railway Labor Executives' Ass'n* v. *Gibbons*, 448 U.S. 1301 (1980) (Stevens, Circuit Justice). It is true that stay requests by other parties were denied by the court of appeals, but those other parties did not advance constitutional objections to the February 19 order (see Pet. App. 21-38).

2. Furthermore, petitioners do not appear to challenge the court of appeals' central holding on the taking issue—namely, that an erroneous determination by a federal district court that the compensation paid for private property was constitutionally adequate would not be a "taking" of property by the United States (Pet. App. 16-21). This holding is, at all events, clearly correct.

The district court was authorized to ascertain whether the consideration offered by a private party—the Soo—for the Milwaukee Road's assets was constitutionally adequate. The court was not authorized by Congress to exercise the power of eminent domain or acquire any part of the property for the United States. Any legal or factual error in determining the amount of compensation constitutionally due was subject to correction in the usual manner. It did not—any more than any other judicial error—constitute a taking or give rise to a claim for compensation from the United States. This Court made clear in the *Regional Rail Reorganization Act Cases,* 419 U.S.

102 (1974), upon which petitioners principally rely, that " '[t]he taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims." 419 U.S. at 127 n.16 (quoting *Hooe* v. *United States,* 218 U.S. 322, 336 (1910)); see also *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1016 (1984); *Mitchell* v. *United States,* 267 U.S. 341, 345 (1925); *United States* v. *North American Co.,* 253 U.S. 330, 334 (1920).

As the court of appeals observed, accidental and unintended injuries inflicted by ordinary governmental actors generally are treated as torts, not as takings, and torts are compensable by the United States only to the extent permitted by the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (Pet. App. 16-18). The discretionary function exception to the FTCA, 28 U.S.C. 2680(a), would preclude liability for an error made in an administrative adjudication. *United States* v. *Varig Airlines,* 467 U.S. 797, 809-810, 813-814 (1984). A fortiori, an error committed by an Article III court in the adjudication of a case or controversy does not give rise to liability under the FTCA, since the courts are not covered by the FTCA. See 28 U.S.C. 2671. The remedy for an erroneous judgment by a district court is an appeal (to the extent Congress has made an appeal available), not an independent suit against the United States for compensation, whether under the FTCA or under the Tucker Act.

The court of appeals therefore properly concluded that "a judicial error in the implementation of a program is not a taking, if a correct implementation of the program would not be a taking" (Pet. App. 18). In this case, a correct decision under the MRRA that the compensation paid for rail properties was constitutionally adequate would by definition not result in a taking of that property by the

United States. It follows that an error in that decision likewise would not be a taking. "Were it otherwise, the Treasury would guarantee the accuracy of all administrative and judicial decisions. That was certainly not the understanding in 1791, when the Takings Clause was added to the Constitution; to the contrary, there was consensus that the sovereign could not be sued for errors save with its consent" (*id.* at 19).

3. a. Petitioners acknowledge the legitimacy of the court of appeals' concern that if a taking claim would lie against the United States whenever a district court erred, "the floodgates would be opened" (Pet. 10). Petitioners argue that this case is special because, they allege, the MRRA gave the district court no authority to address the issue of whether the compensation was adequate. In petitioners' view, Congress intended the question of the adequacy of compensation to be decided only in a suit against the United States under the Tucker Act.

The real question presented by the petition is therefore whether the MRRA, as a statutory matter, authorizes bankruptcy court review of the adequacy of compensation prior to transfer of assets. That narrow question does not merit this Court's review. The Commission, the district court, and the court of appeals unanimously concluded that the adequacy of the compensation *was* properly considered in these proceedings under Section 5. In particular, the court of appeals held that the MRRA "neither requires nor authorizes a judge to transfer property for compensation that is less than the constitutional minimum," and that the MRRA therefore "makes adequate compensation a condition of any sale" (Pet. App. 20). The Seventh Circuit has extensive experience in cases arising under the MRRA (see also 45 U.S.C. 1018(a)(2)), and its interpretation of that Act therefore is entitled to special weight. *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 254-255 (1985); *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). In addition, Section 5(b) of the MRRA dealt only with the sale of the Milwaukee Road's rail assets, and it therefore is of no continuing importance. The Seventh Circuit's resolution of the statutory question at issue here therefore does not warrant review by this Court.

b. In any event, the Seventh Circuit's interpretation of the statute is clearly correct. Section 5(b) of the MRRA provided for a prospective purchaser of the Milwaukee Road's lines to file an "appropriate application" with the Commission. Because the MRRA did not define the term "appropriate application," the Commission had the responsibility for giving content to that term. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). The Commission reasonably determined that such an application should be governed by standards that have evolved under Section 5 of the Interstate Commerce Act and Section 77 of the Bankruptcy Act of 1898, which apply to essentially similar transactions and proceedings and which require that the acquisition be fair and equitable to the stockholders. Petitioners have not shown that this interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844. There is, for example, nothing in Section 5(b) to support the proposition that either the Commission or the bankruptcy court was required to approve a sale without regard to whether the debtor would receive adequate consideration. Indeed, common sense virtually compels the conclusion that Congress would not have intended to require the court and the Commission to blind themselves to so critical a feature of a proposed sale as the adequacy of the consideration. Common sense further suggests that Congress would not have intended to require that the compensation owing be paid by the public, through a Tucker Act suit, rather than by the private railroad that will acquire and receive the benefit of the assets. The interpretation given Section 5(b) by the Commission and both courts below therefore is correct.

c. Petitioners rely extensively on the *Regional Rail Reorganization Act Cases* for the proposition that they should be entitled to seek additional compensation in a Tucker Act suit. This case, however, is wholly different from the *Regional Rail Reorganization Act Cases.* Through the Regional Rail Reorganization Act, Congress mandated that the rail properties of several bankrupt railroads be transferred to a new private railroad, Conrail. The Act also created a new Government corporation, the United States Railway Association, to identify the rail properties to be conveyed and the value of those properties. 419 U.S. at 111-117. As the court of appeals said, the Regional Rail Reorganization Act "not only required a transfer without a prior [judicial] finding of adequate value, see 419 U.S. at 155, but also could have caused a taking by the erosion of value during the judicial proceedings, *id.* at 122-25" (Pet. App. 20). By contrast, Section 5(b) of the MRRA did not mandate the transfer of the Milwaukee Road's rail assets to a new entity. It merely allowed the court to provide for the sale of the debtor's property to another private party during the bankruptcy proceedings.

The Regional Rail Reorganization Act authorized an extraordinary process—transfer of the properties in exchange for Conrail securities first, and *then* valuation of the properties with the bill for any shortfall sent to the United States—precisely because Congress wanted the properties transferred promptly to an entity whose securities might not have constitutionally adequate value; in essence the Court ruled that Congress was prepared to buy part (it turned out to be essentially all) of the railroad. By contrast, there is no evidence that in the MRRA Congress sought to have the Milwaukee Road's properties transferred to any transferee not able and willing to pay consideration equal to their value—and no reason to think that Congress wanted to foot the bill itself rather than have that value determined as a precondition to transfer. The *Regional Rail Reorganization Act Cases* do not demonstrate that the transfer-first, value-later approach was required under the MRRA, and certainly do not support the notion that persons who have litigated their constitutional claims and lost are entitled to relitigate the same claims in a Tucker Act suit on the theory that the defeat itself constituted a taking.[9]

d. Petitioners contend (Pet. 11-12), however, that a congressional intent to afford them a Tucker Act remedy is reflected in 45 U.S.C. 1018(c). This contention is without merit. Section 1018 was enacted in 1980 as an amendment to the Rock Island Railroad Transition and Employee Assistance Act (RITEA), 45 U.S.C. 1001 *et seq.* It addresses the question of judicial review under the RITEA and the MRRA. Section 1018(a) provides that appeals of decisions concerning the constitutionality of either Act must be taken to the Seventh Circuit. Section 1018(b) establishes certain procedures for such appeals. Section 1018(c) then provides:

> Nothing in [the RITEA] or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28 (commonly referred to as the Tucker Act).

By its terms, Section 1018(c) merely provides that any cause of action that is otherwise available under the

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[9] Petitioners' reliance (Pet. 13-14) on *In re Penn Cent. Transp. Co.*, 520 F.2d 1388 (3d Cir. 1975), is equally misplaced. That case likewise involved the Regional Rail Reorganization Act, and it therefore likewise did not present a situation in which there had been a judicial determination, prior to the transfer, that the compensation was constitutionally adequate.

Tucker Act shall not be precluded. It does not purport to grant a right to recover a money judgment from the United States where such a right would not otherwise exist. In this case, no such cause of action otherwise exists.

The legislative history of 45 U.S.C. 1018(c) likewise lends no support to petitioners' contention. That provision was enacted as part of the Staggers Rail Act of 1980, Pub. L. No. 96-488, §701, 94 Stat. 1959, not as part of the MRRA in 1979. It therefore cannot be read to establish congressional intent that under Section 5(b) of the MRRA, the bankruptcy court was required to approve a sale of the Milwaukee Road's lines without regard to whether the compensation was constitutionally adequate. Furthermore, the legislative history shows that 45 U.S.C. 1018(c) was enacted in specific response to an injunction that had been entered by the district court in the Rock Island reorganization litigation, which barred implementation of a labor protection statute that effectively directed the payment of $75 million from the bankrupt estate. The persons whose property allegedly was taken as a result of that statute would have received no compensation for their loss. Congress therefore enacted 45 U.S.C 1018(c) to ensure that compensation would be available under the Tucker Act for any taking that might be found, thereby saving the constitutionality of the special Rock Island labor protection statute against a taking claim. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 137 (1980); *Railway Labor Executives' Ass'n* v. *Gibbons,* 455 U.S. 457, 463-464 (1982); *Railway Labor Executives' Ass'n* v. *Gibbons,* 448 U.S. 1301, 1305 (1980) (Stevens, Circuit Justice). The legislative history does not mention a sale of assets under Section 5 of the MRRA as another occasion on which a cause of action should be available under the Tucker Act. Moreover, the legislative history in fact confirms that Congress intended to make the Tucker Act available where the statutory provision involved did not otherwise assure the payment of just compensation. As we have explained, Section 5(b) of the MRRA, as applied by the Commission and the courts below, did provide for the payment of just compensation.

4. While the merits of petitioners' valuation claim were not reached below,[10] and are not presented by the petition, we note that we strongly disagree with petitioners' contention that the owners of a railroad are statutorily or constitutionally entitled to sell it to the highest bidder without regard to the public interest. Although the owners cannot be required to donate their property to the public, the nature of their property interests is affected by the fact that they "invested their capital in a public utility that does owe an obligation to the public," and "by their entry into a railroad enterprise, assumed the risk that in any depression or reorganization the interests of the public would be considered as well as theirs." *Reconstruction Finance Corp.* v. *Denver & R.G.W.R.R.*, 328 U.S. at 535-536; see also *New Haven Inclusion Cases,* 399 U.S. at 431-433; *Penn Cent. Merger Cases,* 389 U.S. 486, 499, 510-511 (1968); cf. *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1980).

In this case, the Commission performed a comprehensive financial analysis of the Soo's application and determined, based on projected earnings, that the Soo proposal exceeded the comparable market values of other interstate railroads and far exceeded the net liquidation value of the Milwaukee Road's rail assets. At the same time, both the Commission and the district court concluded that the public interest, including the interest in competition, would be better served by sale of the assets to the Soo than by sale to CNW. See pages 5-7, *supra*. The Constitution did not entitle the owners of the Milwaukee Road to sell their lines to the high bidder without regard to these public interest determinations. Cf. *Ashbacker Radio Co.* v. *FCC,* 326 U.S. 327, 333 (1945); accord *Burlington Northern Inc.—Control—Green Bay,* 354 I.C.C. 458, 498-499 (1977).[11]

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[10] Contrary to petitioners' intimations (Pet. 4, 9), the court of appeals did not hold that the compensation they received was constitutionally inadequate. The court of appeals declined to reach that question. See Pet. App. 12-13.

Petitioners also did not have a constitutional right to have the review process under Section 5(b) of the MRRA restructured so as to fit the time demands of a bidder who quickly got cold feet. Petitioners, as well as the Soo, CNW, and GTC, had every reason to believe that bids reflected in the "appropriate applications" submitted to the Commission for approval on the first occasion would be regarded as final offers. All parties concerned also had every reason to believe that one or more of those offers would be found to be constitutionally adequate. CNW did not thereafter increase its offer until October 9, 1984, after the Commission had already found that the Soo's offer and CNW's own initial offer would satisfy constitutional standards. CNW soon developed misgivings about the wisdom of its revised offer. CNW accordingly withdrew its offer immediately after the district court rendered its oral findings on February 8, 1985, and petitioners sought mandamus and prohibition relief in the court of appeals in part for the specific purpose of preventing CNW from withdrawing its bid. The statutory procedures Congress has prescribed for evaluating the relative merits of competing applications to purchase rail lines are not rendered unconstitutional merely because one of the bidders was unwilling to pursue those procedures further in order to obtain the official governmental approval that is required for any person to acquire rail lines.

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[11] Furthermore, a complete assessment of the just compensation issue in these circumstances could not ignore the substantial countervailing benefits petitioners realized under the MRRA. The Milwaukee Road and the unions representing its employees entered into a special labor protection agreement pursuant to special authority in the MRRA (45 U.S.C. 908, 912, 914), which resulted in reductions in the Milwaukee Road's labor protection obligations that amounted to perhaps hundreds of millions of dollars. See *In re Chicago, M., St.P. & Pac. R.R.*, 701 F.2d 604, 607 (7th Cir.), cert. dismissed, 463 U.S. 1233 (1983); *In re Chicago, M., St. P & Pac. R.R.*, 713 F.2d 274, 278 (7th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). In addition, Sections 7(d) and (e) of the MRRA authorized the Secretary of Transportation to guarantee trustee certificates of the Milwaukee Road to cover its losses attributable to maintenance and continuation of services during a specified period. See 45 U.S.C. 906(d) and (e). Section 7(h) then provided that all obligations of the Milwaukee Road under those guarantees would be cancelled if more than 50% of its rail system was purchased. 45 U.S.C. 906(h)(1)(B). The district court's February 19 order in fact cancelled liabilities totalling more than $100 million, including interest, under that provision (Pet. App. 45).

Petitioners also contend (see Pet. 9 & n.5) that in any event the CNW offer is controlling evidence of fair market value. But the history of CNW's revised offer, just described, substantially undermines petitioners' contention that that offer reflected what a "willing" buyer would pay for the assets at the time the district court formally entered its order on February 19, 1985. The Constitution did not require that CNW's short-lived offer be given controlling weight, to the exclusion of what the court of appeals described as the ICC's "mountainous valuation studies and two full opinions" (Pet. App. 12), in deciding the compensation question.

5. Finally, we note that petitioners never argued before the Commission or the district court that the United States would be liable for any difference between the consideration paid by the Soo and that offered by CNW. Rather, petitioners, like the other parties, litigated the question of the value of the assets and the adequacy of consideration on the premise that petitioners would receive only what they were paid by whichever applicant was permitted to acquire the property. Indeed, when peti-

tioners sought a writ of mandamus or prohibition in the court of appeals on February 12, 1985—which was *after* the district court concluded in its oral findings of February 8 that the consideration offered by the Soo was adequate—petitioners argued that they would "be without an effective remedy" if the sale to the Soo was authorized and CNW's offer was withdrawn. Emergency Original Petition for Writ of Mandamus and/or Prohibition at 3. If petitioners had raised the Tucker Act issue before the Commission and the district court, the United States and the Commission could have considered the potential liability of the public for as much as $210 million when weighing the relative merits of the Soo's and CNW's proposals. Petitioners should not be permitted to trap the United States in that manner, by raising the issue only after the proceedings in district court were completed and the sale to the Soo could not be set aside.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY and
CHICAGO MILWAUKEE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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In The

Supreme Court of the United States

October Term, 1986

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO MILWAUKEE CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

The central question in this case is whether petitioners' Tucker Act remedy should be deemed to have been preempted by the reorganization court's gratuitous finding of just compensation. The reorganization court made this finding despite the fact that the compensation awarded to petitioners for their rail assets was $210 million less than the amount another purchaser was willing to pay. If that gratuitous finding is not vacated, the government will seek to bar petitioners' Tucker Act suit for recovery in the Claims Court. Although the government vigorously resists the limited relief sought by petitioners, the government completely fails in its attempt to show that the finding was necessary or appropriate to the determination which the district court was required to make. Because *of the magnitude of the taking* at issue in this case, the importance of the principle established by the Seventh Circuit, and the conflict created with other decisions of this and other courts, this Court should grant certiorari.

1. The government principally contends (Br. Opp. 12) that the reorganization court's finding of adequate compensation was not unnecessary because that finding cannot be "severed" from the approval of the sale. That is true, the government asserts (Br. Opp. 12), "because the MRRA [Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-922] did not authorize the court to approve the sale for consideration that was not constitutionally adequate." This contention—that the MRRA does not permit a transfer *without* adequate compensation—is the essential, indispensable premise upon which the government's position is based. It is wrong.

The MRRA does not authorize, let alone require, the reorganization court to make a determination that the compensation paid for rail lines is fair and adequate. The government attempts to read this requirement into the MRRA by means of a four-step rationalization: first, the Commission "construed" the MRRA to incorporate requirements of the Interstate Commerce Act; second, the Commission relied upon the interpretation given to the Interstate Commerce Act by the courts; third, the Commission concluded from these cases interpreting the Interstate Commerce Act that the MRRA was meant to require payment of fair market value; and, fourth, the reorganization court adopted the Commission's interpretation. (Br. Opp. 2-3.) The logic of this argument is illusory. Deference to the Commission is unwarranted because it was not engaged in generally applicable rulemaking or adjudication, but was simply construing special legislation for its own benefit. More importantly, the Commission's rationale ignores the plain fact that the MRRA includes *no* provision conditioning the court's approval of a sale of rail assets upon a prior finding that compensation is just.

In the absence of any express language in the MRRA, and in the absence of any judicial precedent interpreting the MRRA, this Court must look to the overriding purpose of the statute. In the MRRA, Congress enacted special legislation which had as its express overriding purpose the preservation of uninterrupted essential rail service in the Midwest. (45 U.S.C. § 901.) Like the Regional Rail Reorganization Act, the MRRA was intended to facilitate an expedited transfer of rail property in order to ensure preservation of essential rail service. (Pet. 11.) Following this Court's decision in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), Congress explicitly incorporated a Tucker Act remedy to make it clear that there was redress for any shortfall in the adequacy of compensation.

In view of Congress' central purpose of maintaining rail service, the Commission and the reorganization court both decided in favor of a sale to the Soo rather than to the CNW, the higher bidder, despite their finding that both bidders satisfied the traditional public interest tests of the Interstate Commerce Act. The Commission and the court ruled in favor of the Soo because the Soo better fulfilled the public interest concerns which led to the enactment of the MRRA: more rail lines would remain in service with the Soo than with the CNW, and more rail jobs would be preserved. In light of these overriding congressional objectives, the reorganization court felt it had no choice but to sacrifice the best interests of the estate to the public interest, and consequently endorsed the Soo bid.

Moreover, as the court of appeals expressly recognized, the MRRA is distinguishable from the general bankruptcy statute which requires the bankruptcy court to consider the adequacy of compensation. (Pet. App. 14.) In an ordinary bankruptcy, the identity of the purchaser is a matter of complete indifference to the government; under the MRRA, the identity of the purchaser is essential. The MRRA permits a judge to award the sale of a railroad's lines to a particular purchaser (who may not be the highest bidder), whereas the general bankruptcy statute requires an auction, with the sale to the highest bidder. If Congress had intended that the reorganization court order the sale of rail lines to the highest bidder without regard to public interest considerations, it could have provided for a simple public auction as in the ordinary bankruptcy case. Congress did not do so.

When the government argues that the MRRA did not authorize the reorganization court to take property (Br. Opp. 14-15), it not only misinterprets the Act, but it also misinterprets the authorities it cites. The cases upon which the government relies are inapposite; these cases simply stand for the proposition that no taking had occurred when a government agent either exceeded the scope of its authority, *see, e.g., United States v. North American Transportation & Trading Co.*, 253 U.S. 330, 334 (1920), or committed an act specifically forbidden, *see Hooe v. United States*, 218 U.S. 322 (1910). These cases would apply here only if the government could establish that the district court exceeded its jurisdiction; but the government does not and cannot make this argument because the reorganization court was authorized by the MRRA to order the sale of the Milwaukee Road's rail assets in the public interest. The court acted within the scope of its authority in ordering the sale. The "error" in authorizing a sale at less than fair market value is not an "error" at all, because it is specifically what Congress contemplated—a sale in which the driving principle is not full compensation to the seller, but furtherance of the public interest in continued rail service. Congress recognized that those two factors—full compensation and furtherance of the public interest—are independent variables, and that there was no assurance that both could be satisfied. Thus, in the MRRA, Congress directed the reorganization court to approve a sale of rail assets by exclusive reference to the public interest. This, most clearly, is a taking of private property for public purposes. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-44 (1984).

The government's attempt to read into the MRRA a requirement that nowhere appears in the Act—that compensation be just before a sale of rail assets may be mandated—would eviscerate the statutory policy adopted by Congress. The fallacy of the government's argument is well demonstrated by the fact that, under the government's construction, continued rail service could not be preserved in the event that only one bid was submitted and that bid was for an amount less than the constitutional minimum. In addition, the emergency nature of the Act and the public purposes it was intended to foster are wholly incompatible with the government's interpretation. The MRRA itself authorizes a taking and incorporates the right to Tucker Act relief.

Moreover, the government's argument improperly reads out of the MRRA the Staggers Rail Act amendment to the MRRA, which states that nothing contained in the MRRA "shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act." 45 U.S.C. § 1018(c). The legislative history of that amendment totally rebuts the limited genesis and purpose for which the government argues (Br. Opp. 20-21). (Pet. 11-12.) More importantly, the legislative history of that amendment in no way undercuts the broad sweep of its language. Thus, the question whether there was a taking here is properly a question for the Claims Court. (Pet. 12-14.) As the government itself has so recently and powerfully argued to this Court (*see* Brief for the United States, *United States v. William Hohri*, No. 86-510 at 16-17), congressional policy requires that all Tucker Act claims be centralized in the Claims Court and the Court of Appeals for the Federal Circuit.

2. The government argues (Br. Opp. 12-14) that a claim against the United States is precluded because (a) the CNW withdrew its $210 million higher bid, and (b) the Debtor and CMC did not seek a stay from the court of appeals to prevent the sale of the core rail assets to the Soo.

This argument simply misses the point. In fact, petitioners timely invoked the only procedural mechanisms which would have prevented the necessity for Tucker Act relief—a writ of mandamus and a stay in the reorganization court. Either of these avenues of relief would have forestalled entry of an order directing the sale to the Soo. Because the CNW had reserved the right to withdraw its bid once the reorganization court had entered an order authorizing a sale to its opponent (R. 44), these were the only procedures that would have preserved the status quo and avoided the necessity of Tucker Act relief.

Petitioners were confronted with the fact that the CNW withdrew its bid to avoid tying up its management energies and assets in a protracted appellate struggle. Thus, petitioners could have exercised their theoretical right to seek a stay pending appeal, but the most that such a stay could have achieved would have been to defeat the sale to the lower bidder—at a time when the higher bid already would have been withdrawn. Moreover, by reason of Bankruptcy Rule 8-703(a)(6), 11 U.S.C. App. at 1412

(1976 ed.), after the sale to the Soo had been consummated, appeal of the order authorizing sale was effectively precluded. For these reasons, the government's emphasis on the subsequent procedural history is irrelevant.

In sum, no purpose would have been served by seeking a stay of the reorganization court's sale order *after* the sale order had been entered. Not only could the CNW have validly withdrawn its $210 million higher bid at that time, but the Soo offer also might have been lost. The defeat of any sale would have prolonged the reorganization proceedings, delayed the payment of creditors, and increased the likelihood that the Milwaukee Road, like the Rock Island, would have to be liquidated and rail service abandoned. These results would have been antithetical to the purposes of the MRRA. To assert that petitioners are now precluded from seeking relief under the Tucker Act because they declined to seek a stay—which would have benefitted no one—is to exalt form over substance and to ignore the very purpose for which the MRRA was enacted.

Finally, the government cannot now be heard to complain that the Trustee chose to mitigate his damages by proceeding to close on the Soo sale rather than run the additional risk of unravelling that deal as well, and possibly jeopardizing all chance of continued rail service. If the Trustee had decided not to proceed with the Soo sale in the hope of resurrecting the CNW bid, the government undoubtedly would now be asserting that the Trustee had failed to mitigate his damages. In any event, whether the Trustee properly mitigated his damages by proceeding to close on the Soo sale is an issue that should be resolved by the Claims Court in a Tucker Act proceeding.

3. The government advances the alternative argument (Br. Opp. 21-24) that the determination of adequacy of

compensation was not an "error". The government asserts that because petitioners invested their capital in a railroad, public interest obligations were attendant to the investment, and could be expected to lower their return. (Br. Opp. 21.) This argument, which could be used to justify virtually every inequitable treatment of any public utility, was properly and explicitly rejected by the court of appeals. (Pet. App. 15.) As the court of appeals noted (Pet. App. 15-16), the Commission approved the CNW bid as consistent with the public interest under the traditional standards of the Interstate Commerce Act. Absent the special provisions of the MRRA, this was all that the public interest required. Moreover, each of the bids had already taken into account the cost of federal and state regulation of railroads. Otherwise, as the court of appeals recognized, the bids might have been even higher. (Pet. App. 15-16.)

The government's defense of the Commission's methodology in determining the adequacy of consideration offered by the Soo (Br. Opp. 21) also is unfounded. While reliance on hypothetical formulas and ratios might have provided the best evidence of fair market value prior to the receipt of the CNW's higher bid, such reliance could not withstand scrutiny after that bid was made. The CNW offer was a serious and legitimate offer which, but for the MRRA's heightened public interest requirements, would have been accepted. Once the CNW made its offer, there was a price established by a willing buyer and a willing seller, which the courts repeatedly have held to be the best evidence of fair market value. (Pet. App. 13.)

As the government correctly notes (Br. Opp. 21 n.10), the court of appeals did not expressly decide the question whether the CNW's bid established the constitutional minimum of just compensation for these lines. Nonetheless, even a cursory review of the court of appeals' opinion leaves little doubt as to its position on this issue. The court of appeals stated that "actual bids usually *establish* the 'fair market value' of the property." (Pet. App. 7, emphasis in original.) The court of appeals also observed that the Commission's first decision relied on the absence of a bid higher than the Soo's to prove that CMC's valuation methodology was unrealistic, but that, ultimately, the CNW's bid matched the amount at which CMC had valued the property. (*Id.*) Finally, the court of appeals cited numerous cases which establish that (Pet. App. 13):

> the district judge erred in believing that $570 million would have been 'just compensation', had the United States condemned the Milwaukee's rail properties. See *United States v. 50 Acres of Land*, [469 U.S. 24] (1984) (the price that a willing buyer would pay a willing seller is the constitutional measure of just compensation); *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982) (the fair market value of a line of railroad is the line's scrap value when there is no higher bid); *In re Valuation Proceeding*, 445 F.Supp. 994, 1008-29 (Spec. Rail Ct. 1977) (Friendly, J.)(rejecting the argument that valuation should be at scrap value when a sale at a higher price for a rail use is possible); cf. *In re Chicago, Rock Island & Pacific R.R.*, [794 F.2d 1182, 1185 (7th Cir. 1986)] (actual bids, not hypothetical calculations, are the best indicia of value).

The government's attempt to justify the findings of the Commission and the reorganization court relating to the adequacy of consideration is squarely rebutted by the precedent cited by the court of appeals.

4. This case merits this Court's review not merely because of the magnitude of the taking involved, but because it is necessary for this Court to establish the parameters of lawful governmental action with regard to property taken under special legislation. If the Seventh Circuit's ruling is permitted to stand, the government will have

escaped the consequences of its own actions. It will have license to draft and enact special legislation, have its own administrative agency resolve ambiguities in its favor, and then urge the courts to defer to agency "expertise". This is not the standard of conduct that the Fifth Amendment requires when the government chooses to take private property for public purposes. To paraphrase the government's colorful metaphor, "the trap" (Br. Opp. 24) here is laid by, not for, the United States.

For the foregoing reasons and the additional reasons stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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